TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 456

J. C. PENNEY COMPANY, APPELLANT,

vs.

JOHN B. LEWIS, W. P. SULLIVAN AND EMERSON BEAUCHAMP, INDIVIDUALLY AND AS MEMBERS OF THE STATE TAX COMMISSION OF THE COMMONWEALTH OF KENTUCKY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED OCTOBER 9, 1934.

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[fols. a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

J. C. Penney Company, a Delaware Corporation, Plaintiff,

vs.

John B. Lewis, Selden R. Glenn and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Bill of Complaint—Filed Jan. 24, 1931

The plaintiff, J. C. Penney Company, a corporation organized under the laws of the State of Delaware, brings this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and says:

I

The plaintiff, J. C. Penney Company, is now and at all times herein mentioned it was a corporation duly created, organized and existing under the laws of the State of Delaware, with its principal office and place of business for the State of Delaware in the city of Wilmington, in the State of Delaware, and it is a citizen and a resident of the State of Delaware.

It is authorized to do and it is doing business in the Commonwealth of Kentucky, and since commencing to do business in Kentucky it has continuously complied with all the laws of the Commonwealth of Kentucky relating to foreign corporations authorized to do business therein, and particularly with the requirements of Section 571, Kentucky Statutes, relating to the manner in which foreign [fol. 2] corporations are required to qualify themselves to do business in the Commonwealth of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Selden R. Glenn are inhabitants of the Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax [fol. 3] Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall be, and he is, charged under said Act with the duty of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

The controversy in this suit is wholly between citizens of different States, to wit, between the plaintiff, which is a citizen of the State of Delaware, and the defendants named in the foregoing caption to this bill, who are all citizens and residents of the Commonwealth or State of Kentucky.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

[fol. 4] Plaintiff charges that said Act is unconstitutional, null and void because, in the respects hereinafter stated,

it is violative of the various provisions of the Constitution of the United States and of the Fourteenth Amendment thereto, hereinafter more specifically set forth, and also violative of various provisions of the Kentucky Constitution, likewise hereinafter set forth.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally introduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Kentucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth,

[fol. 5] said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its passage its title was amended, as shown by the House Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

[fol. 6] V

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose of said House Bill 111 was changed by amendment by the Committee to which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be is enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act,

shall mean and include every person, firm, association, co-[fol. 7] partnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of [fol. 8] one per cent on the excess of the gross sales over

Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

"In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

"§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should [fol. 9] any retail merchant, as defined herein, be liable

for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

"§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action [fol. 10] for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein,

have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided that, this prohibition shall not extend to information required in prosecutions for making false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions [fol. 11] of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the particular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts [fol. 12] shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

Throughout the calendar year 1930, this plaintiff has been engaged in conducting 21 retail stores, one of which has been operated since March 21, 1930, in 21 different cities or towns hereinafter mentioned, in the Commonwealth of Kentucky, where plaintiff sells exclusively at retail Dry Goods, Shoes, Clothing, Notions, Piece Goods, and similar articles of merchandise usually handled in stores of the same general character and hereinafter more specifically set forth in connection with a statement as to the merchandise handled in the several departments into which each of its stores is divided.

It sells exclusively at retail and exclusively for cash—extending no credit—in each of its stores in Kentucky, which are located in the cities or towns hereinafter mentioned, namely:

Maysville,	Mayfield,	Frankfort,
Paducah,	Owensboro,	Hopkinsville,
Richmond,	Bowling Green,	Winchester,
Middlesboro,	Paris,	Henderson,
Madisonville,	Princeton,	Georgetown,
Glasgow,	Lancaster,	Central City,
Mount Sterling,	Lexington,	Corbin,

Gross sales made by plaintiff in said retail stores respectively during the calendar year 1930 and during the period [fol. 13] of said calendar year beginning March 17th and ending December 31st, both dates inclusive, are as follows:

Store number	Gross sales calendar year 1930	Gross sales March 17 to December 31, 1930
1	$104,586.62	$81,782.61
2	114,666.90	93,598.00
3	101,583.71	84,008.18
4	312,449.10	262,149.56
5	244,892.55	198,856.14
6	111,537.69	88,842.16
7	165,120.03	133,643.96
8	129,039.14	108,590.68
9	129,968.63	107,280.25
10	59,920.58	49,457.63
11	89,879.43	72,875.37
12	66,549.75	55,775.04
13	66,228.17	55,819.40
14	59,092.10	48,887.79
15	59,514.91	48,465.65
16	79,206.38	65,854.21
17	39,015.55	31,431.75
18	80,270.84	68,027.16
19	73,463.52	62,355.95
20	64,034.36	51,345.64
21	85,128.10	85,128.10
Total gross sales in all stores in Kentucky	$2,236,148.06	$1,854,174.23

VIII

Plaintiff conducts in each of said retail stores owned or operated by it in Kenutcky what is known as a department store, embracing in a typical store of those above mentioned and in practically every one of its stores so mentioned, separate departments, in which plaintiff sells at retail merchandise of various kinds within the general classification of merchandise sold by it, as follows:

(1) Men's Wear, including dress and work clothing, furnishings, hats, gloves;

(2) Women's Wear, including lingerie, accessories, hosiery and kindred items;

[fol. 14] (3) Women's Ready-to-Wear, including women's and girls' dresses and coats, and millinery;

(4) Shoes, Men's, Women's and Children's shoes and rubber footwear;

(5) Piece goods, including silk and cotton piece goods, and dress goods, draperies, linens, bedding, rugs;

(6) Notions, Infants' Goods, Toilet Goods.

Each of said retail stores is operated by plaintiff separately from its other stores. A complete set of books of accounts is separately kept for each of said stores. These books show all phases of the operation of said store, such as its sales, expenses of operation, rental, taxes, insurance and all other overhead expense, enabling plaintiff to determine, after allocating to each store its proper proportion of plaintiff's overhead, the net results of operation of each and every one of its said retail stores. Through this system of record keeping, plaintiff can determine the wisdom or policy of maintaining or continuing the operation of a given store, or any changes of policy to develop sales in each store.

In the conduct of its general business in each of the Kentucky cities or towns in which its owns and operates a store, plaintiff comes into competition with a large number of other stores selling merchandise of a similar character in the same city and in other near-by cities in Kentucky, and the same is true as to each department operated by plaintiff in each such retail store inasmuch as each of said departments is compelled to and does actively compete with the specialized stores or with stores dealing in similar lines of goods in the same city or town or near-by cities or towns.

Such competition extends not only to the matter of buying power but also to selling and the fixing of prices on goods sold, so as to make them sell in competition with other dealers in similar goods in the same city or town or near-by cities or towns, and such competition applies not only to plaintiff's conduct of each such store as a whole but as to its conduct of each unit or department in each such store.

IX

There is in each Kentucky city or town where this plaintiff conducts a retail store a large number of individuals, co-

[fol. 15] partnerships and corporations which are engaged in the business of a retail merchant and are in active competition with this plaintiff, and which own and/or operate a single store in which a retail business is carried on similar to that carried on in the same city or town by this plaintiff. Said retail merchants competing with the plaintiff conduct their business under similar circumstances and in many instances do a very much larger volume of business and have much larger gross retail sales than the store of this plaintiff located in the same city or town and directly competing therewith.

This plaintiff, in each of its stores, carries on its business as a retail merchant in every way exactly as the business of a retail merchant is carried on by its competitors in stores which are operated by them respectively and which are separately owned and/or operated by one individual, co-partnership or corporation doing business as a retail merchant.

Plaintiff deals in the same character of articles and merchandise and sells to the same public and its business is distinguishable from that of a retail merchant operating only one store in no way whatsoever except that in plaintiff's case it owns and operates more than one store in Kentucky, though at widely-separated points, while in the case of other retail merchants competing with it, such retail merchant owns and/or operates but one store in Kentucky, though in many instances such retail merchant actually owns and operates in other States a large number of retail stores conducting the same general kind of business.

The ownership and/or operation by plaintiff of more than one store in different cities or towns does not increase the fire hazard to property in any of said cities or towns, or injure the health or morals of the community, or require increased or additional public or police protection beyond what may be required in the case of any other store of like character handling a similar class of merchandise, regardless of the number of stores that its owner may elsewhere own and operate.

X

The business conducted by plaintiff as a retail merchant in Kentucky and elsewhere has developed gradually through

constant study and application of efficient broad-gauge [fol. 16] methods of conducting the business of a retail merchant with due regard to the interests of the buying public and a sustained effort to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale and the development of a large volume of sales and a more rapid turn-over of merchandise and capital.

The founder of plaintiff's business was J. C. Penney, who began his business career as clerk in a general store. The proprietor of that store helped him to establish himself in a similar business in another town, where he proved to be a successful merchant and soon developed as much business as that town had to offer, whereupon he invested his savings in a similar store, in another city or town, which he put in charge of his principal clerk; and in time the most competent clerk in that store was put in charge of another store in still another city or town. In this way there grew up a chain of stores, in which every manager was a partner or part owner, at least of the store managed by him. In due time a corporation was organized to take over the business thus jointly owned, and to protect the principle of each manager's partnership or part ownership, an opportunity was afforded them to acquire and practically all did acquire stock in the corporation so organized.

The manager of each of plaintiff's stores in Kentucky has charge of practically all matters relating to his particular store—in many instances to the same extent as a sole proprietor thereof. He determines for the store managed by him what lines of goods are best adapted to the needs of the buying public in that community and can thus be handled or sold to best advantage in that store. He selects all the merchandise to be handled in said store and determines the kind and quality thereof and has sole charge of supplying his store with goods to be stocked therein for sale.

He likewise maintains a local bank account in the city or town in which his store is located, where he deposits all proceeds received from the sale of goods in his store. From this said bank account he pays the salaries of the employees of his store and all other local expenses and, in his own discretion, from said bank account makes donations and sub-

[fol. 17] scriptions to any form of public welfare or civic or cultural organization in his community; and forwards sufficient funds to pay for the merchandise bought for sale in his store to a regional bank to be used in payment thereof.

The manager of each store is expected to and actually does identify himself with the city or town in which said store is located, and in many instances he owns his own home and is connected with various organizations, such as churches, lodges, luncheon clubs, and local organizations of merchants or taxpayers or citizens generally.

Practically every manager of a local store in any city or town is employed under a contract with plaintiff, by virtue of which contract he receives a salary, and in addition thereto, a percentage of the profits of said retail store conducted by him. A successful manager has always been given the privilege of purchasing stock in plaintiff at a price below the current market quotations, with the result that such manager of a store in Kentucky is practically a partner with this plaintiff in the operation of said store, so that the impo-tion of the unjust tax herein complained of directly affects not only the income of this plaintiff but also the income which such manager of plaintiff receives as the direct result of his conduct of his said store in that said tax not only reduces the profits of said retail store but will inevitably reduce the amount of sales which can be made in said store by rendering this plaintiff and its said local manager unable to meet competition with other stores in the same or near-by localities in various highly-competitive lines if plaintiff is to be burdened with the payment of the illegal tax assailed in this case.

XI

As long as it has been doing business in Kentucky, plaintiff has paid all ad valorem taxes levied upon its property by competent State, county or municipal authority, and has likewise paid all valid or legal excise or occupational taxes exacted of it by any such authority.

In addition to the payment of its annual ad valorem taxes, plaintiff has paid to the Commonwealth of Kentucky, during the calendar year 1930, corporation license taxes in the sum of $446.04, and has also paid, during the calendar year [fol. 18] 1930, to various cities or towns in Kentucky, li-

cense or occupation taxes levied by them respectively in sums aggregating $1,053.50.

Plaintiff does not sell in any of its stores in Kentucky any articles upon the sale of which any license or excise tax is levied by the Commonwealth of Kentucky.

XII

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiff's retail store, or in plaintiff's method of conducting or managing same, that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-hundredth part of the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XIII

As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to this plaintiff and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to this plaintiff and all others similarly situated.

[fol. 19] XIV

During the calendar year 1930, the total gross retail sales made by plaintiff in all its stores in Kentucky and in all departments conducted by it in its several retail stores, aggregated $2,236,148.06, of which amount, gross retail sales aggregating $1,854,174.23 were made between March 17, 1930 (the date of approval of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales claimed by defendants to be the proper basis for ascertainment of the taxes to be exacted of plaintiff under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by said challenged Act, and deducting all credits allowed plaintiff by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales		$200.00 Tax
2/20 of 1% on next $100,000 of sales		100.00 Tax
5/20 of 1% on next $100,000 of sales		250.00 Tax
8/20 of 1% on next $100,000 of sales		400.00 Tax
11/20 of 1% on next $100,000 of sales		550.00 Tax
14/20 of 1% on next $100,000 of sales		700.00 Tax
17/20 of 1% on next $100,000 of sales		850.00 Tax
1% of excess over $1,000,000 of sales		8,541.74 Tax
Total tax above computed		$11,591.74
Credits allowed under Section 4 of the Act:		
Corporation license tax paid in 1930	$446.04	
License or occupation taxes paid Kentucky cities or towns	1,053.50	
Total credits allowed under Section 4		1,499.54
Net tax levied upon plaintiff		$10,092.20

XIV

Each separate retail store in Kentucky owned or operated by plaintiff as a retail merchant, and likewise each separate department therein, comes into direct competition with a large number of other specialized individual retail stores in Kentucky, conducted by other retail merchants, which deal mainly and often exclusively in a particular kind or class of goods handled and sold by plaintiff in a particular store in Kentucky, or department therein handling or selling that class or line of goods.

In no single retail store, or single department therein, conducted by plaintiff in any of its retail stores in Kentucky, do the gross sales in any calendar year, or for the [fol. 20] period beginning March 17, 1930, and ending De-

cember 31, 1930, amount to as much as $400,000. Nor do the gross annual sales of any specialized retail store owned or operated by any other retail merchant in Kentucky as a single store in competition with any retail store of plaintiff, or department therein (either for the entire calendar year 1930 or for the period beginning March 17, 1930, and ending December 31, 1930) exceed in any case the sum of $400,000, and each of such competing stores owned and operated by such other retail merchants has gross annual sales not exceeding $400,000 in amount, and in a vast majority of cases not exceeding $100,000 in amount, and in a great many cases not exceeding $50,000 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against plaintiff and denies to it the equal protection of the law, and imposes upon it a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one retail store of plaintiff, or department therein, are in every case taxed, if taxed at all, under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of plaintiff's store or department therein competing with said specialized single store are added to their gross sales in all its other stores and departments therein so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in every case is levied under said Act upon the specialized single store competing with one of plaintiff's retail stores or departments in such retail stores, respectively.

XV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiff in each retail store and/or in each of the several separate departments thereof operated in Kentucky by plaintiff in [fol. 21] actual competition with other retail merchants in

the same city or section of Kentucky that have a smaller volume of gross annual sales and are taxed, if at all, under said challenged Act at the minimum rate of 1/20 of one per cent therein provided.

Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the relatively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were each provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have [fol. 22] gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxa-

tion under said Act, in any appreciable amount and those who are taxed at all constitute a very small class of limited number as compared with the vast number of retail merchants who are wholly exempt from taxation under said Act. There is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax exceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

On the other hand, exactly the same volume of annual gross sales made by plaintiff in one of their stores or departments therein in competition with said average retail merchants would be added to all the other gross annual sales made in all plaintiff's other stores or departments therein located in Kentucky and thus a large part of said gross subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store and competing with plaintiff in [fol. 23] the sale at retail of goods of the same kind and

character. Credits allowed to plaintiff under Section 4 of said Act, when proportionately allocated to each of its stores or departments therein would amount to a very insignificant part of the tax levied upon plaintiff by reason of their annual gross sales in each such store or each department therein.

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or assocation of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores and/or departments, are each engaged in the sale at retail of wholly different merchandise and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and success-

[fol. 24] fully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Kentucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by plaintiff in its retail stores and by retail merchants generally throughout Kentucky and other States, facilities, services and advice in selecting, buying, advertising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by the plaintiff in its retail stores and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be paid therefor, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations and agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his or its own account [fol. 25] a stock of merchandise for sale in his or its retail

store or stores, and they can buy goods of as high class and quality, at similar prices, as the plaintiff or any other retail merchant similarly situated, and they can and do get the benefit of similar facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, and in practically every case it is, less than $400,000 per annum in such retail store owned or operated by them in Kentucky.

Hence plaintiff, by reason of its operation of several stores and the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the stores of this plaintiff or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in plaintiff's store or department competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiff have, by reason of their advantages, made substantial inroads and encroachments upon the trade of plaintiff in their various departments established and conducted prior to the opening or establishing of such specialized individual stores now operating in competition with plaintiff.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against this plaintiff and in favor of the retail merchant conducting a specialized individual store.

XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales [fol. 26] and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,-

000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of all retail stores in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax [fol. 27] is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales

and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the ability of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of [fol. 28] gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar of sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great (or greater) purchasing and buying power and have as great (or greater) advertising and merchandising ability as the plaintiff and as other retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid although similarly cir-
[fol. 29] cumstanced and in direct competition with the plaintiff and with other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of taxation or to report for taxation the total

sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiff is subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiff and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiff and other retail merchants similarly situated.

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales and continuously to increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which plaintiff is engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiff and other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiff and all other retail merchants similarly situated [fol. 30] are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested capital employed in the conduct of their business. Such merchandising methods are the basis of the business of

the plaintiff and all other retail merchants similarly si
uated, are of benefit to the general public of the Commo
wealth of Kentucky and have brought to the plaintiff an
all other retail merchants similarly situated, a large an
valuable good will and a large sales volume.

XXII

The unfair, unjust, unequal, oppressive and discrimina
tory rates of taxation exacted by said challenged Act, o
plaintiff and all other retail merchants similarly situate
not only imposes upon them an unjust and intolerable bu
den for the benefit of other retail merchants engaged in lik
business but having a smaller volume of annual gross sale
but will inevitably destroy or impair, and the purpose o
said challenged Act is to destroy or impair, the good wi
and established trade or business and thereby to reduce th
volume of annual gross sales made by plaintiff and oth
retail merchants similarly situated and, as far as possibl
under said Act, to divert trade and custom from the reta
stores of plaintiff and other retail merchants similarl
situated and taxed in the higher brackets of taxation, t
the more numerous but less progressive and enterprisin
retail merchants who have very much smaller annual gros
sales and therefore, if taxed under said Act at all, are taxe
at rates very much lower than those exacted by said A
of plaintiff and other retail merchants similarly situate

Said challenged Act, in its purpose and effect, is wholl
lacking in uniformity in its application to the persons o
occupations taxed thereunder, and it designedly transfe
to and imposes upon plaintiff and all other retail me
chants similarly situated an undue proportion and pra
tically the entire burden of the license taxes attempted i
said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates i
favor of retail merchants having a small or comparativel
small volume of annual gross sales, and in effect levies
subsidy for their benefit to be paid wholly by plaintiff an
[fol. 31] other retail merchants similarly situated, who hav
annual gross sales in larger volume. In so doing, sai
challenged Act denies to plaintiff and other retail me
chants similarly situated the equal protection of the law
guaranteed to it and to them by the Equal Protection Claus
of the Fourteenth Amendment to the Constitution of th

United States and also by the fundamental law of the State of Kentucky.

XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as plaintiff conducts in its retail stores, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiff in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiff are entirely too numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and plaintiff brings this suit on its own behalf and on behalf of all such individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against plaintiff or any of the other [fol. 32] retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against plaintiff or any of said other retail merchants on whose behalf this suit is brought.

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required

therein is subject to an added penalty of 20 per cent plus 6 per cent per annum interest, with a further additional penalty of 20 per cent if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiff states that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiff and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiff, to make said payments, the said defendants will attempt to enforce against them, including plaintiff, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiff, any other [fol. 33] penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiff and other retail merchants similarly situated.

XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at

which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act set forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13, being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed by Section 55, under which said Act could not and did not become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the [fol. 34] specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiffs say that in no event, under Section 55 of the

Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiff says that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates the provisions of the Constitution of Kentucky as herein set forth, and plaintiff now specially sets up and claims herein the rights, benefits, privileges, immunities and exemptions secured to it by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Kentucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

(a) It denies to plaintiff and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to plaintiff and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discrimina-
[fol. 35] tory against the plaintiff and all other retail merchants similarly situated, and in that it taxes plaintiff and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classification, and at the same time imposes upon other retail merchants, doing the same kind of business in substan-

tially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiff and other retail merchants attempted to be taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the taxpayer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer [fol. 36] could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

Plaintiff says that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the

General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiff says that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiff has no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

XXIX

Plaintiff says that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will take steps, by prosecution of the plaintiff and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against plaintiff the severe penalties provided in said Act, and also to enforce the collection from this plaintiff of said illegal tax, in the sum of $10,092.20 as hereinbefore computed and stated, and also to compel plaintiff, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against plaintiff, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of this plaintiff amounting *of* [fol. 37] $1,854,174.23, upon which, under said Act, a tax would result against this plaintiff of $10,092.20 as hereinabove set out, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiff and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiff and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiff, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiff, and others similarly situated, and as a result thereof, plaintiff, and others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

(3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiff as taxpayer of the Commonwealth of Kentucky.

(4) If plaintiff and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' [fol. 38] fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiff and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the

courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiff and others similarly situated do not have a plain, adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of Commonwealth of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiff would be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail stores and needed by them to carry on their business therein. The payment of so large a sum of money [fol. 39] will impair the ability of the plaintiff to operate their business in Kentucky and will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiff, and thereby decrease the amount of gross annual sales and of profits therefrom that plaintiff will be able to make in each of its retail stores in Kentucky and for all such wrongs the plaintiff has no plain,

adequate or complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiff and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal constitution-.

Prayer for Relief

Inasmuch, therefore, as the plaintiff is without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiff prays:

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiff and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiff and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiff, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; [fol. 40] from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiff and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiff, its agents, servants, or employees, or any person, firm or corporation similarly situated in the Commonwealth of Ken-

tucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482, entitled: "An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act," be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiffs.

IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in [fol. 41] plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers

similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiff, J. C. Penney Company, by counsel comes and moves the court, upon its verified Bill of Complaint herein showing that immediate and irreparable injury, loss or damage will result to plaintiff before notice upon defendants can be served and a hearing had upon its application this day made for an interlocutory injunction, to grant it a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, pending the hearing and determination of plaintiff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

[fol. 42] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue Doolan, Helm & Helm, Solicitors for Complainants.

IN UNITED STATES DISTRICT COURT

MOTION FOR INTERLOCUTORY INJUNCTION—Filed January 24, 1931

The plaintiff, J. C. Penney Company, by counsel, comes and moves the Court, upon its verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

[fol. 43] (1) From enforcing or executing, either directly or indirectly, against this plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection

of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suits or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiff, J. C. Penney Company, by counsel, and upon its verified Bill of Complaint herein,

entered its motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of its application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiff before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiff's application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiff and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of it or them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and

(b) Any officer, director, trustee or agent of said plaintiff and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiff and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiff or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will [fol. 45] result to plaintiff and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiff a temporary restraining order without

notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaitniff's application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against plaintiff and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act";

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiff and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiff and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against this plaintiff and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiff or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

[fol. 46] (3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person,

firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiff shall give bond with good security, to be approved by this Court or the Judge thereof, in the penal sum of -2,500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by the defendants or any of them who may be found to have been wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDER—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges can not be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this [fol. 47] Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-style three cases be continued in effect beyond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM BILL OF COMPLAINT—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

[fol. 48] All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise," line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act," line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed February 14, 1931.

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follow-:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists betwen the parties hereto, and that the bill shows on its face that complainants are being deprived [fol. 49] of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitors for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931.

Come the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and for their answer to the Bill of Complaint filed in the above styled action plead as follows, to-wit:

I

For answer to paragraph I of plaintiff's bill of complaint, they say that they do not have sufficient information to answer the allegations contained in the first two literary paragraphs thereof relating to the organization of plaintiff and its authority to do business in this State and, therefore, neither admit or deny the same but require strict proof thereof. They admit, however, all the allega-[fol. 50] tions contained in the third, fourth, and fifth literary paragraphs of said paragraph I.

II

For answer to paragraph II, defendants deny that an Act of the General Assembly of Kentucky, 1930 Session,

approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, same being Chapter 149 of the Session Acts of 1930, is void for the reasons set out in the bill of complaint, or at all. Defendants admit all the other allegations contained in said paragraph II.

III

The defendants, for answer to paragraph III of plaintiff's bill of complaint, deny that this action is a suit of a civil nature or should be brought for the purpose of enjoining the defendants, or either of them, from enforcing, or attempting to enforce, said Act, or for the purpose of enjoining the defendants, or either of them, from requiring the plaintiffs, or other tax payers, or tax payer, similarly situated as hereinafter set forth, to make reports which said Act purports to require of retail merchants, or requiring information in reference to sales made by the plaintiffs, or either of them, or all said retail merchants similarly situated as hereinafter set forth, or from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated, and tax purporting to be levied or assesed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiff, or any of said retail merchants similarly situated as hereinafter set forth, or to recover any of the penalties sought to be imposed by said Act upon the plaintiff, or any of said retail merchants similarly situated as hereinafter set forth, because of a violation of any of the terms of said Act.

Defendants deny that said Act is unconstitutional, null or void *because,* in the respects hereinafter stated, or that it is violative of the various provisions, or any provisions of the Constitution of the United States or of the 14th Amendment thereto, or violative of various provisions of the Kentucky Constitution hereinafter set out.

[fol. 51] IV

Defendants, for answer to paragraph IV of the bill of complaint, admit that House Bill 111 was introduced in the House of Representatives on January 31, 1930, with the following title: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants of the Commonwealth," and then it was so read. They

deny, however, that it was on February 14, 1930, or on any other date, read with the following title: "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants of the Commonwealth," by the Committee on Kentucky Statutes, or that it was ever read on February 18, February 19, or on any other date by said title, or by any other title, except the one shown on the enrolled bill as same appears in the office of the Secretary of State of the Commonwealth of Kentucky, a certified copy of which is filed herewith and made part hereof as if copied herein in full, marked exhibit "A." They deny that it was read, voted on, passed, signed, approved or enrolled by any other title than the one shown by the certified copy above referred to.

V

Defendants, for answer to paragraph V, deny that said House Bill No. 111 was introduced in the House of Representatives in response to the recommendation made by the Governor of Kentucky, in his annual message of January, 1930, for legislation to be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned or operated in aid of such individually owned or operated stores. They deny that, while said House Bill No. 111 was pending before the House Committee to which it was referred on its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on or about February 1, 1930, in which a measure similar in legal effect to said House Bill No. 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States or therefore void. They deny that the purpose of said House Bill 111 was not changed by amendment by the Committee to which it had been referred or that the bill as so amended or passed in [fol. 52] the manner hereinbefore set out or approved by the Governor was so framed as to contain the obnoxious or unconstitutional features hereinafter set out.

VI

Defendants, for answer to paragraph VI of the bill of complaint, admit all the allegations contained in said paragraph VI.

VII

Defendants, for answer to paragraph VII of the bill of complaint, say that they have not sufficient information to answer the allegations contained therein and, therefore, they neither deny or admit the same, but require strict proof thereof.

VIII

The defendants, for answer to paragraph VIII of the bill of complaint, deny that plaintiff conducts in each of said retail stores, owned or operated by it in Kentucky, what is known as a department store, embracing in a typical store of those mentioned above, and in particular every one of its stores so mentioned, separate departments, in which plaintiff sells at retail merchandise of various kinds within the general classification of merchandise sold by it as follows:

(1) Men's Wear, including dress and work clothing, furnishings, hats, gloves;
(2) Women's Wear, including lingerie, accessories, hosiery and kindred items;
(3) Women's Ready-to-Wear, including women's and girls' dresses and coats, and millinery;
(4) Shoes, Men's, Women's and Children's shoes and rubber footwear;
(5) Piece Goods, including silk and cotton piece goods, and dress goods, draperies, linens, bedding, rugs;
(6) Notions, Infants' good-, Toilet Goods.

Defendants deny that each of said retail stores is operated by plaintiff separately from its other stores or that it keeps a complete set of books or accounts separately for each or any of said stores, or that these books show all phases of the operation of said stores such as its sales, [fol. 53] expenses of operation, rental, taxes, insurance or all other overhead expenses enabling plaintiff to determine, after allocating to each store its proper proportion of plaintiff's overhead, the net results of operation of each or every one of its said retail stores.

They deny that plaintiff, through its system of record keeping, can determine the wisdom or policy of maintaining or continuing the operation of a given store, or any changes of policies to develop sales in each store.

The defendants deny that the plaintiff, in the conduct

of its general business in each or any of the Kentucky cities or towns in which it owns or operates a store, comes into competition with a large or any number of other stores selling merchandise of a similar character in the same city or in other cities in Kentucky. They deny that the same is true as to each department operated by plaintiff in each or any such retail store in as much as each of said departments is compelled to or does actively compete with specialized stores or with stores dealing in similar lines of goods in the same city or any city or town or in nearby cities or towns. They deny that such competition, or any competition, extends not only to the matter of buying power but also to selling or the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in the same city or any city or town or nearby cities or towns, or that such competition applies not only to the plaintiff's conduct of each such store as a whole or as to its conduct of each unit or department in each such store.

IX

The defendants, for answer to paragraph IX of the bill of complaint, deny that there is in each Kentucky city or town where this plaintiff conducts a retail store or any store, a large or any number of individuals, co-partnerships or corporations which are engaged in the business of a retail merchant or are in active competition with this plaintiff, or which owns or operates a single store in which a retail business is carried on similar to that carried on in the same city or town or any city or town by this plaintiff. They deny that said retail merchants competing with the plaintiff conduct their business under similar circumstances or in any instances do a larger volume of business or [fol. 54] have a larger gross retail sales than the store of this plaintiff located in the same city or town or directly competing therewith. They deny that this plaintiff, in each or any of its stores, carries on its business as a retail merchant in any way exactly as the business of a retail merchant is carried on by its competitors in stores which are operated by them respectively or which are separately owned or operated by one individual, co-partnership or corporation doing business as a retail merchant.

They deny that the plaintiff deals in the same character

of articles or merchandise or sells to the same public or its business is distinguishable from that of a retail merchant operating only one store in no way whatsoever except that in plaintiff's case it owns or operates more than one store in Kentucky, though at widely separated points. They deny that there are other retail merchants competing with the plaintiff operating but one store in the State of Kentucky, or that such merchants own or operate but one store in Kentucky, or in any instance, operate in other states a large or any number of retail stores conducting the same general kind of business as plaintiff.

X

The defendants, for answer to paragraph X of the bill of complaint herein deny that the business conducted by plaintiff as a retail merchant in Kentucky, or elsewhere, has developed gradually through constant study or application of efficient broad-*guage* methods of conducting the business of a retail merchant with due regard to the interests of the buying public or a sustained effort to sell merchandise at the lowest possible price consistent with a small percentage of profit on each individual sale or the development of a large volume of business or sales or a more rapid turnover of merchandise or capital.

The defendants deny that the founder of plaintiff's business put into operation the chain store business or that the chain store business was established by J. C. Penney, who proved to be a successful merchant and invested his savings in stores of similar kind in different cities, or that he put in charge of any stores his principal or most competent clerks, or that persons who had charge of plain-
[fol. 55] tiff's stores, as managers or employees, all or any acquired stock in his stores. They deny that the manager of each of plaintiff's stores in Kentucky has charge of practically all or any matters relating to his particular store, or that in any instances the manager has charge to the same extent as a sole proprietor thereof. They deny that he determines for the store managed by him what lines of goods are best adapted to the needs of the buying public in that community or what line of goods can thus be handled or sold to the best advantage in that store. They deny that the manager selects all or any of the merchandise to be handled in said store or departments the kind or quality thereof, or has

sole or any charge of supplying his store with goods to be stocked therein for sale. Defendants deny that the manager maintains a local bank account in the city or town in which his store is located where he deposits all or any of the proceeds received from the sale of the goods in his store, or that from said bank account the manager pays the salaries of the employes of his store or any other local expenses or, in his own discretion, from said bank account makes donations or subscriptions to any form of public welfare, civic or cultural organization in this community, or that he forwards sufficient funds to pay for the merchandise bought for sale in his store to a regional bank to be used in payment thereof. They deny that the manager of each or any such stores is expected or actually does identify himself with the city or town in which said store is located or, in any instance, he owns his own home or is connected with various organizations, such as churches, lodges, luncheon clubs or local organizations of merchants or taxpayers or citizens generally. They deny that any manager of a local store in any city or town is employed under a contract with plaintiff, by virtue of which contract he receives a salary or, in addition thereto, a percentage of the profits of said retail store conducted by him. They deny that a successful manager has always been given the privilege of purchasing stock in plaintiff's company at prices below the current market quotations with the result that such manager of a store in Kentucky is practically a partner with this plaintiff in the operation of said store, or that the imposition of any tax herein complained of, directly or indirectly, affects either the income of this plain-
[fol. 56] tiff or the income which such manager of plaintiff receives as the direct result of his conduct of his said store in that said tax either reduces the profits of said retail store or that it will reduce the amount of sales which can be made in said store either by rendering this plaintiff or its local manager unable to meet the competition with other stores in the same or nearby localities in various highly-competitive lines if plaintiff is to be burdened with the payment of the tax assailed in this case.

XI

The defendants, for answer to paragraph XI of the bill of complaint, say that they have no information as to the

allegations contained therein and, therefore, they neither deny or admit the truth of such allegations, but require strict proof thereof.

XII

Defendants, for answer to paragraph XII of the bill of complaint, say that they have no information as to the peculiar methods by which plaintiff conducts its business and, therefore, they neither deny or admit any statement contained in said paragraph relating thereto, but require strict proof thereof.

They further say that, in so far as said Chapter 149 of the Acts of 1930, referred to in said paragraph, they deny that such Act is purely a tax measure or that it is not an exercise of police power or that it does not relate to the public health or public welfare, public morals or the public safety.

XIII

Defendants, for answer to paragraph XIII of the bill of complaint, deny that the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, or, as hereinafter more specifically shown, the classification of retail merchants therein made is deliberately or designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to this plaintiff or any other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, or in its higher brackets of taxa-
[fol. 57] tion, is confiscatory as to this plaintiff, or others similarly situated, or at all.

XIV

Defendants say they do not have sufficient information to answer the allegations contained in paragraph XIV of plaintiff's bill of complaint and, therefore, neither deny or admit the same, but require strict proof thereof.

Defendants deny that any retail store in Kentucky owned or operated by plaintiff, as a retail merchant, or any separate deperament therein, comes into direct competion or any competition with a large or any number of other specialized individual retail stores in Kentucky conducted by other retail merchants, which deal at all in a particular kind or class of goods handled or sold by plaintiff in a particular

store in Kentucky, or department therein handling or selling that class or line of goods.

They deny that in no single retail store or single department therein, conducted by plaintiff in any of its retail stores in Kentucky, do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $400,000.00. They deny that the gross annual sales of any specialized retail store owned or operated by any other retail merchant in Kentucky, as a single store, in competition with any retail store of plaintiff, or department therein, did not exceed for the entire calendar year 1930, or for the period beginning March 17, 1930, and ending December 31, 1930, in any case the sum of $400,000.00, or that each of such competing stores owned or operated by such other retail merchants had gross annual sales not exceeding $400,000.00 in amount, or that in a vast majority of or any cases not exceeding in amount $100,000.00, or that in any cases not exceeding $50,000.00 in amount.

Defendants deny that it thus resulted that the Act of 1930 designedly or otherwise, by its terms, worked a discrimination against plaintiff or that said Act denies to plaintiff the equal protection of the law or imposes upon it an unequal, oppressive, arbitrary or discriminatory burden of taxation in that the specialized single stores competing with any one retail store of plaintiff, or department therein, are in any case taxed under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided [fol. 58] by Section 4 of said Act. They deny that the gross sales of plaintiff's store or department therein competing with said specialized single store are added to their gross sales in all its other stores or departments therein so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act. They deny that at the rate of one per cent plaintiff's tax rate is twenty times or any times in excess of the rate that in any case is levied under said Act upon a specialized single store competing with one of plaintiff's retail stores or departments in such retail stores respectively.

XV

Defendants, for answer to paragraph XV of the bill of

complaint, deny that such Act of 1930 contains in Section 4 thereof a provision which in effect, or otherwise exempts from the payment of any tax thereunder all or any retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiff in any retail store or in any of the several departments thereof operated in Kentucky by plaintiff in actual competition with other retail merchants in the same city or section of Kentucky that have a smaller volume of gross annual sales or are taxed under said challenged Act at the minimum rate of 1/20 or one per cent therein provided.

Defendants deny that Section 4 of said challenged Act provides in substance or effect, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact, or at all, provided so as to in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act or in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under the laws now in force, or hereafter enacted, shall be a substitute for any license tax otherwise exacted of them under the Act.

Defendants deny that the credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied [fol. 59] thereunder, are sufficient in practically all cases, or any cases, to offset the tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000.00, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or the allowance of said credits by way of remission of the tax levied in the Act or the graduation of said tax were each provided for in said Act as a part of a legislative scheme to tax retail merchants having a large volume of gross annual sales or to exempt from taxation retail merchants having a small volume of gross annual sales.

Defendants deny that there are few retail merchants in Kentucky whose gross annual sales, in a single or individually owned store, exceed $400,000.00, or the gross annual

sales of all or any of such retail merchants are below $100,000.00, or in any instances below $50,000.00.

Defendants deny that, in practical effect or operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, or who have annual sales in all their stores or departments aggregating more than $400,000.00 are subject to taxation under said Act in any appreciable amount or those who are taxed at all constitute a small class or limited number, as compared with the number of retail merchants who are wholly or at all exempt from taxation under said Act. Defendants deny that there is no just or reasonable basis for the classification of retail merchants for the purpose of taxation under said Act..

Defendants deny that the average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000.00, or has gross annual sales aggregating less than $50,000.00, or such a retail merchant would, as a rule, or at all, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10.00 to $15.00.

Defendants deny that, if such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000.00, fully paid in or invested in its single retail store in Kentucky, or has therein gross annual sales of $50,000.00, it could not be [fol. 60] assessed under said Act of 1930 with a tax exceeding $25.00, or as a matter of fact, or otherwise, in general practice it would not be assessed with any tax at all, or with a smaller tax than $25.00, because its annual corporation license tax levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per thousand dollars of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would at all offset any tax imposed upon it by said Act, or would thus be a substitute for any tax so imposed upon it by said Act.

Defendants deny that the volume of annual gross sales made by plaintiff in one of its stores, or departments therein, in competition with any retail merchant would be added to any other gross annual sales made in any of plaintiff's other stores, or departments therein, located in Ken-

tucky or thus subjected to a tax at the rate of one per cent as compared with the tax of 1/20 of one per cent levied by said Act upon any other retail merchant conducting any retail store or competing with the plaintiff in the sale at retail of goods of the same kind or character. Defendants deny that credits allowed plaintiff under Section 4 of said Act, when proportionately allocated to each of its stores or departments therein, would amount to an insignificant part of the tax levied upon plaintiff by reason of its annual gross sales in each store or each department therein.

XVI

The defendants, for answer to paragraph XVI, deny that the design, intent, practical operation or effect of Section 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments, as defined in said Act, to aggregate for the purposes of taxation the gross sales of stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments may be separate or distinct enterprises; without regard to their location or without regard to the fact that said stores, or departments, are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments.

[fol. 61] Defendants deny that the design, intent or practical operation of said Act is thereby to tax, penalize or, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, or to tax, penalize or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

Defendants, for answer to paragraph XVII, deny that, for many years past, or at all, there have been various or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording

to so called individual or single-store retail merchants engaged in Kentucky, or elsewhere, in the business of selling at retail, goods, wares, or merchandise of the character handled or sold by plaintiff in its retail stores or by retail merchants generally throughout Kentucky, or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky, or elsewhere, corresponding in any material respects as to price, quality or kind with the merchandise handled or sold by plaintiff in its retail stores or by other retail merchants similarly situated.

Defendants deny that these co-operative associations or agencies, for a comparatively small fee or at all, afford to retail merchants operating individual specialized stores throughout Kentucky, or elsewhere, affiliated with them, all or any of the facilities or advantages, in the matter of selection of goods or prices to be paid therefor, that can be obtained by any large organizations operating on its own account, or in any cases such co-operative associations or agencies afford to their members or patrons better advantages or facilities along such lines, or at all.

Defendants deny that such co-operative associations or agencies afford to any retail merchants in Kentucky, or elsewhere, affiliated with them, the benefit of their advice or experience or co-operative action in securing increased results in advertising the goods of such retail merchants to [fol. 62] the buying public, or as advice or suggestions as to the most approved or advanced method of selecting goods of the proper style or quality, or for displaying such goods in the retail stores of the various merchants affiliated with such co-operative association or agency. Defendants deny that practically all, or any, retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000.00, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services or faciilties thus, or at all, afforded by said co-operative associations or agencies. Defendants deny that, in this manner, or at all, such retail merchants have as great buying power as the plaintiff or any other retail merchant buying on his, or its own, account a stock of merchandise for sale in his or its retail store or stores, or that

they can buy goods of as high class or quality, at similar prices, as the plaintiff or any other retail merchant similarly situated, or that they can or do get the benefit of similar facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, or in practically any case it is, less than $400,000.00 per annum in such retail store owned or operated by them in Kentucky. Defendants deny that plaintiff, by reason of its operation of several stores or the larger volume of gross sales made by it therein, has no advantage whatever over the retail merchant operating a specialized individual store in competition with the stores of this plaintiff or any department therein. Defendants deny that any of such specialized individual stores have gross annual sales of merchandise handled by them exceeding in volume the gross annual sales of such merchandise handled or sold in plaintiff's store, or department, competing with such specialized individual retail merchant.

Defendants deny that the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located. Defendants deny that any of such specialized individual retail stores competing with the plaintiff have, by reason of their advantages, or otherwise, made [fol. 63] substantial or any inroads or encroachments upon the trade of plaintiff in any departments established or conducted prior to the opening or establishment of such individual stores now operating in competition with plaintiff.

Defendants deny that there is no just, proper, or reasonable basis for discrimination in the matter of taxation against this plaintiff or in favor of the retail merchant conducting a specialized individual store.

XVIII

Defendants, for answer to paragraph XVIII, deny that the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, or with the sole or any design or intent to burden, oppress, prohibit or discriminate against the ownership or ultimate management of all, or

any, retail stores in Kentucky having a large volume of gross sales (whether in one store or more, or in one department or more in the same store), or thus or at all unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky, or in any State, to increase their sales above $400,000.00. Defendants deny that said increase in its practical operation or effect is unequal or disproportionate in the percentage of tax per one thousand dollars of increased sales. Defendants deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to the plaintiff or other retail merchants similarly situated.

XIX

Defendants, for answer to paragraph XIX, deny that the classification or graduation made as a basis for the tax imposed rests wholly upon the amount of gross sales of any stores controlled or held with others by a majority stock ownership, or controlled or directed by one management or association of ultimate management; or that said classification does not rest upon the ability of the taxpayer to pay said tax, or upon the income or earnings from any store or stores, or that it has no relation to receipts. They deny that it is imposed regardless of whether said sales [fol. 64] are made at a profit or loss or the amount of profit or loss therefrom; or that it has no relation to profits or losses. They deny that it has no relation to the capital employed or invested, or that said Act does not make any provisions for the merchandise returned; for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received. They deny that it classifies sales as to the gross amount thereof by dollars, or that it strikes at the increase in said gross sales by a geometrical increase in the rate of taxation. They deny that said Act taxes the dollar of sales of any retail merchant upon a rate or basis different from the dollar of sales of other merchants engaged in direct competition or similarly circumstanced. They deny that one retail merchant doing twice the business of his competitor is required to pay seven and one-half times or any times as much on his dollar of sales as his competitor who, in

the same class or similarly circumstanced, is required to pay on his dollar of sales, or that said classification is unreasonable, without a rational basis, or is arbitrary, unequal or oppressive.

XX

Defendants, for answer to paragraph XX of the Bill of Complaint herein, deny that competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any or all the advantages which may flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying goods upon a large scale or for scientific or efficient arrangements of stores, window displays or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein. They deny that said co-operative associations combined co-operatively have as great or greater number of stores or have as great, or greater, purchasing or buying power, or have as great, or greater, advertising or merchandising ability as the plaintiff or as other retail merchants who own two or more stores in Kentucky or conduct two or more departments in any retail store so owned or operated by them. They deny that said singly or individually owned stores or [fol. 65] members of co-operative associations, as aforesaid, similarly circumstanced, are in direct competition with the plaintiff or with other retail merchants owning two or more stores, or are required to aggregate or combine for the purpose of taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, or that said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiff. They deny that the practical operation or effect exempts single or individual stores from taxation in said Act. They deny that the plaintiff is subject to taxation at the highest rate prescribed in said Act, or that, by reason thereof, or at all, such competitive stores are given undue or unfair economic advantages over the retail store of the plaintiff, or over other retail merchants similarly situated, or are in effect aided, helped or subsidized by said Act in their competition with the plaintiff or other retail merchants similarly situated.

XXI

The defendants, for answer to paragraph XXI in the Bill of Complaint, deny that this retail merchant is required, by reason of a small percentage of profit on a single sale to have a large volume of sales, or to continuously increase its sales volume, in order to secure a fair return on the capital employed by it in his business. They deny that the highly competitive character of the retail business, in which plaintiff is engaged, or other retail business in the Commonwealth of Kentucky, or elsewhere in the United States, makes it necessary for each merchant to meet such competition or to conform his business methods therewith. They deny that the plaintiff or other retail merchants similarly situated have built up or developed in Kentucky for themselves respectively a large or valuable business upon the basis of selling merchandise at retail to the public at the lowest possible prices, consistent with a small average profit in individual sales. They deny that such merchandising methods are the basis of the business of the plaintiff or any other retail merchants similarly situated or are dependent upon a large volume of [fol. 66] sales in order to secure a fair, reasonable or adequate return upon invested capital employed in the conduct of their business. They deny that such merchandising methods are the basis of the business of the plaintiff or any other retail merchants similarly situated, or are of benefit to the general public of the Commonwealth of Kentucky or have brought to the plaintiff or any other retail merchants similarly situated, a large or valuable good will or a large sales volume.

XXII

The defendants, for answer to paragraph XXII of the Bill of Complaint herein, deny that the rate of taxation, exacted by said Act, of plaintiff or other retail merchants similarly situated are unfair, unjust, unequal, oppressive or discriminatory or that they impose upon them and unjust or intolerable, or any, burden for the benefit or other retail merchants engaged in like business having a smaller volume of annual gross sales, or at all, or that it will destroy or impair, or that the purposes of said Act is to destroy or impair, the good will or established trade or business or

thereby to reduce the volume of annual gross sales made by plaintiff or other retail merchants similarly situated, or to in anywise divert trade or custom from the retail stores of plaintiff or other retail merchants similarly situated, or taxes in the higher brackets of taxation, or taxes other retail merchants having a smaller of greater annual gross sales wholly taxed under the lower rates of said Act.

They deny that said Act, in its purpose or effect, is wholly or at all lacking in uniformity in its application to persons or occupations taxed thereunder, or that the Act designedly or at all transfers to or imposes upon plaintiff or any other retail merchants similarly situated any proportion or practically all or any of the burden of the license taxes in said Act levied upon retail merchants. They deny that the said Act thus designedly, or otherwise, discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or that it in effect levies a subsidy for their benefit to be paid wholly or at all by plaintiff or other retail merchants similarly situated who have annual gross sales in large volumes. They deny that said Act denies to plaintiff or other retail merchants similarly situated the equal pro-
[fol. 67] tection of the laws guarante-d to it or to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or by the fundamental laws of the State of Kentucky.

XXIII

The defendants, for answer to paragraph XXIII of the Bill of Complaint, deny that there is a large or any number of retail merchants engaged in Kentucky in the operation of one store, either with or without separate departments therein, such as plaintiff conducts in its retail stores, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership, or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with the plaintiff in that, under said Act, each or any of them is subject to taxation in the higher brackets or that taxes are excessive, unjust, or discriminatory, by reason of the larger volume of gross annual sales made by them or for any reason, to the exclusion of any number of retail merchants competing with

them respectively, who have smaller gross annual sales or, by reason of credits allowed under Section 4, or any other section, of said Act are required under said Act to pay no tax whatever or an insignificant amount of taxes.

XXIV

Defendants for answer to paragraph XXIV of the Bill of of Complaint, admit each and every allegation contained therein.

XXV

Defendants, for answer to paragraph XXV of the Bill of Complaint, admit that they will attempt to enforce said Act according to its several provisions. They deny however, that such enforcement will work irreparable or any injury or damage to the plaintiff or other retail merchants similarly situated.

XXVI

The defendants, for answer to paragraph XXVI of the Bill of Complaint, deny that Section 13 of the emergency [fol. 68] clause of said Act is void for any reason, or for the reason that the emergency therein recited has no connection with or relation to the purposes for which said Act was enacted by the General Assembly, or that under a decision of the Court of Appeals of Kentucky sufficient reasons *to* meeting the requirements of Section 55 of the Kentucky Constitution was not assigned for making said Act take effect upon its approval by the Governor.

XXVII

Defendants, for answer to paragraph XXVII of the Bill of Complaint, deny that said Act, in any of the particulars hereinbefore pointed out, or at all, is void because it violates the provisions of the Constitution of the United States or the Fourteenth Amendment thereof, or because it violates the provisions of the Constitution of Kentucky as herein set forth, or at all.

(1) Deny that said Act, for the reasons hereinbefore set forth, or at all, is void in the several respects and particulars hereinbefore pointed out, or at all.

(a) Defendants state that said Act does not deny to plaintiff, or any other retail merchants similiarly situated,

due process of law, or that it is an attempt to levy upon them a tax that is confiscatory of their property, or is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder by gross sales of retail merchants made prior to June 17, 1930.

(b) Defendants state that said Act does not deny to plaintiff, or other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiff, or other retail merchants similarly situated, any unreasonable, unjust, discriminatory, oppressive or prohibitive rate of taxation, based upon classification that is unreasonable, unjust or discriminatory against the plaintiff or other retail merchants similarly situated. Deny that it taxes this plaintiff, or other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever or without any [fol. 69] reasonable basis of classification, or at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a lower rate or burden of taxation, or as to an overwhelming number, or any number, of such retail merchants, exempts them from any taxation whatever under said Act.

(c) Deny that, for the reasons hereinbefore set forth, or at all, said Act abridges the privileges or immunities guaranteed to plaintiff by the said Fourteenth Amendment, in the particulars hereinbefore set forth, or at all, or that it is illegal or void.

(2) Deny that said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis or classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of Kentucky.

XXVIII

Defendants, for answer to paragraph XXVIII of the Bill of Complaint, deny that a mandamus for a refund of taxes wrongfully collected could only be brought where the tax is paid under protest or after its payment, or that it could only be brought or prosecuted in the courts of Ken-

tucky, or that a judgment therein in favor of the complaining tax payer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if or when the funds were available for the payment of such warrants in the usual or orderly course.

Defendants deny that the taxes collected under said Act do not go into the General Fund of the Commonwealth or that they are immediately appropriated or applied as provided in said Act, or that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, or can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Defendants deny that it is shown by the monthly financial statement officially issued by the State Treasurer of [fol. 70] Kentucky as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less minor accounts, was $12,565.81, or that were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State treasury or presented for payment but not paid for lack of funds.

Deny that, by reason of the facts herein set forth, or at all, the plaintiff has no remedy whatever in the courts of the State of Kentucky or any remedy at law whatever in the courts of the United States.

XXIX

Defendants, for answer to paragraph XXIX of the Bill of Complaint, admit that they will attempt to enforce the provisions of this Act, but deny that said Act is illegal or invalid or that the tax which will be exacted from the plaintiff is an illegal tax. They further say that they have no information upon which to answer the allegations in said paragraph as to the amount of tax plaintiff will be compelled to pay and, therefore, neither deny or admit such allegations, but require strict proof thereof.

XXX

Defendants, for answer to paragraph XXX, deny that unless they are restrained from enforcing or attempting

to enforce said Act, the plaintiff or any others similarly situated, will sustain irreparable or any loss or injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars, or at all:

(1) Deny that the plaintiff, or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional enactment or for which they are not legally liable.

(2) Deny that, upon the failure of the plaintiff or others similarly situated to pay said taxes, the drastic penalties provided by said Act will be enforced by the defendants against the plaintiff or others similarly situated, or as a result thereof, plaintiff, or others similarly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes or penalties or criminal proceedings [fol. 71] brought to impose the criminal penalties provided in Section 7, of said Act, at great expense or damage to it or them.

(3) Deny that the expenditure by the defendants of the public funds raised by taxation for the purpose of trying to enforce and carry out the provisions of said Act will be to the irreparable or any injury or damage of the plaintiff as taxpayers of the commonwealth of Kentucky.

(4) Deny that if the plaintiff, or others similarly situated, should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they will be put to large expense or any expense, for attorneys' fees or court costs, or be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiff, or others similarly situated, of said large sums or any sums which it would be required to expend in prosecuting such actions for attorneys' fees, court costs or any other expenses, or in any sums for said purposes.

(5) Deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United Etates as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States, or that in consequence

thereof, or at all, the plaintiff or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States. Deny that the only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him, under protest, or that said Section 10 of said Act of 1930 and Section 162 of the Kentucky Statutes, are the only statutes of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the Commonwealth of Kentucky.

Defendants deny that, by no other statute, has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of [fol. 72] taxes illegally exacted from a taxpayer or covered into the treasury of the State.

(6) Defendants deny that said Act is ambiguous or doubtful as to its application or meaning, or as to the procedure or requirement thereunder, or that it has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) Deny that the amount of said annual tax which plaintiff will be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail stores or is needed by them to carry on their business therein. Deny that the payment of such a sum of money will impair the ability of the plaintiff to operate its business in Kentucky or will give competitors of the plaintiff who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair or undue advantage over the plaintiff, or thereby decrease the amount of gross annual sales or of profits therefrom that plaintiff will be able to make in each of its retail stores in Kentucky, or that the plaintiff has no plain, adequate or complete remedy at law, or that the same is true as to all or any other retail merchants similarly situated.

(8) Defendants deny that the enforcement of said Act will have the effect of injuring or impairing any lawful

business in which the plaintiff, or others similarly situated, are engaged or in which they have the undoubted right to engage, which right is guaranteed and protected by the State and Federal Constitutions.

XXXI

For further answer herein, defendants deny each and every allegation of the bill of complaint not heretofore specifically admitted, controverted or denied.

For further answer, the defendants aver and allege as follows:

(1) The Act in question (House Bill 111, now Chapter 149 Acts of the General Assembly of 1930) levies a tax graduated progressively as to rate upon all sales of goods, wares and merchandise at retail in this Commonwealth. [fol. 73] Retail merchants are, under the provisions of said Act, classified by amount of annual gross retail sales. The word "merchant," as defined in said Act, includes every person, firm, corporation, association or co-partnership selling at retail in this Commonwealth, and exactly the same rate is levied upon every merchant doing the same amount of annual gross retail business without regard to whether said merchant operates one store or many stores.

(2) The classification made as a basis for the tax imposed by said Act rests not only on the volume of gross sales, but also upon the ability of the merchants affected by the various gradations of the Act to pay the tax imposed. It being a well established economic law of merchandising that the per cent. of income per dollar of investment increases progressively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said Act, that is to say, those merchants engaged in a retail business in this Commonwealth having gross annual sales of less than $400,000.00 per annum as a class have a net average annual income of only 6.2% upon their investment, and those merchants engaged in a similar retail business having gross annual sales of more than $400,000, or less than $1,000,000, have an average annual income as a class of 7.1% in their invested capital, and retail merchants engaged in a similar business in this Commonwealth having sales of more than $1,000,000.00 per year have an annual income of 9.5-12.1% on their investment.

Defendants further say the examples set out above are illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

(3) Defendants say that the progressive increase of earning power in invested capital, based on increased volume of sales, as illustrated in the paragraph above, conclusively proves a proportionate increase in ability to pay the amount of tax collected.

Defendants further allege that the plaintiff, J. C. Penney Company, and all others similarly situated, have for many years enjoyed and are now enjoying a large and prosperous retail business in this State, and that their gross annual retail sales have, in many instances, exceeded $3,000,000.00 per annum and they have made and are now making a profit [fol. 74] of more than 4.3% of such gross annual sales and that their net profit on their capital invested in the retail business in this Commonwealth was and is annually more than 9.2%.

(4) Defendants further say that the increased ratio of earning power of capital invested to volume of sales is brought about by the operation of certain well known and well recognized economic laws as follows:

(a) It is a well established and well recognized law of merchandising economics that the greater the volume of sales the greater the buying power, and that goods, wares and merchandising such as sold by this plaintiff and others similarly situated can be purchased at a much lower price in great volume than in small volume and that the purchasing power alone of plaintiff, and others similarly situated, enables them to purchase goods, wares and merchandise at —% less than goods, wares and merchandise of like quality can be purchased by individual retail merchants having a small volume of sales and who are in competition with this plaintiff, and others similarly situated.

(b) It is a well recognized and established rule in this Commonwealth that the ratio of turnover or volume of trade to capital invested increases progressively as the volume increases, that is to say, retail merchants doing an annual retail business comparable to that done by this plaintiff do a very much greater volume in ratio to capital

invested, than do individual merchants having a small volume of annual business.

(c) It is a well established rule of merchandising economics that the cost of marketing decreases per dollar of sales as volume increases and this plaintiff, and others similarly situated, can and do distribute at retail goods, wares and merchandise sold by them at much less expense than a like amount of similar merchandise can be distributed through the stores of other individual competitors.

(d) Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and [fol. 75] that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small percentage of taxes on invested capital will be taxed at the higher rates under said Act.

(e) Defendants further say that the above result is brought about in part by the fact that property is assessed for ad valorem taxes in this State on July 1st in each year, and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated, by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business who are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated, are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than 0.45%

upon their volume of sales, while their smaller competitors have been forced to pay .7% on their volume of sales.

(5) Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

[fol. 76] Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

(6) For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welsh, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed March 23, 1932

This case having been heard with the case of Stewart Dry Goods Company v. John B. Lewis, et al., (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiff's motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon

appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant.
Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon. Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harmon Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. R. Turley,
N. A. Bash,	G. H. Parker,	James R. Karibo,
B. E. Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	T. B. Jones,	P. O. Wolverson,
J. A. Gude,	B. E. Willis,	J. D. Delano,

L. M. Ross,	B. A. Aistrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites.

[fol. 78] and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same entered motion to strike out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read evidence upon the hearing of plaintiffs' motion for interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burr and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 79] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Member of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that

[fol. 80] said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit ned not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of

[fol. 81] Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver—the immunity against suits in Federal Courts granted to States by the Eleventh Amendment to the Federal Constitution.

The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official

[fol. 82] capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff that the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if

the remedy under Section 10 is the same remedy granted [fol. 83] by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to

hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained [fol. 84] under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not pledge the State to redeem them by any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable, and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled prin-

ciple of law that interest can not be collected from a sov-
[fol. 85] ereign State unless its recovery is specifically authorized by a State statute, we can not presume that the Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final de-

[fol. 86] termination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalities, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 87] IN UNITED STATES DISTRICT COURT

ORDER AND DECREE—December 9, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, and Fred Levy, et al., against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiff's motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking Company against John B. Lewis, et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiff's said motion for an interlocutory injunction herein is hereby denied, to which the plaintiff excepts.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiff for the reasons set forth in its said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiff a permanent injunction or any injunctive or other relief prayed by it.

It is therefore adjudged and decreed that the plaintiff's bill herein be dismissed, and that the defendants recover of the plaintiff their costs herein expended: to all of which the plaintiff excepts.

The plaintiff having this day stated in Court its intention to appeal from this Order and Decree, denying plaintiff's motion for an interlocutory injunction, and denying its application for a permanent injunction and dismissing its bill

[fol. 88] of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiff, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiff, and shall remain in full force and effect as to the plaintiff and each of said taxpayers so listed, until the final determination of plaintiff's said appeal, to all of which defendants except and object; Provided, however, that the plaintiff, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiff, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiff or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiff herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiff in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., [fol. 89] upon its compliance, within thirty (30) days, with

the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fols. 90-100] In United States District Court

Order Substituting Auditor of Public Accounts, etc.— March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot,

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 101-107] Bond on appeal for $1,000.00, approved and filed March 1, 1932, omitted in printing.

Citation, in usual form, showing service on John B. Lewis et al., omitted in printing.

[fol. 108] IN UNITED STATES DISTRICT COURT

MANDATE OF UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA, ss:

(Seal.)

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Western District of Kentucky, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Kentucky, before you, or some of you, in a cause between J. C. Penney Company, Plaintiff, and John B. Lewis, Selden R. Glenn, and Henry M. Cline, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al., etc., Defendants, wherein the decree of the said District Court, in favor of the said defendants, was duly entered in said cause on the 9th day of December, A. D. 1931, which decree is fully set out in the record of said cause in the office of the clerk of said District Court and is incorporated herein by reference thereto; as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, [fol. 109] reversed with costs; and that the said Plaintiff, J. C. Penney Company, recover against the said Defendants Two Hundred and Ninety-nine Dollars and Sixty Cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for final hearing upon the merits, without prejudice to a de-

termination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by section 10 of the Act in question are accorded preference in payment over other warrants and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under section 10 they would be afforded a certain, reasonably prompt and efficacious remedy.

October 24, 1932.

You, therefore, are hereby commanded that such execution and further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, the nineteenth day of November, in the year of our Lord one thousand nine hundred and thirty-two.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 110] IN UNITED STATES DISTRICT COURT

ORDER FILING MANDATE—Entered December 10, 1932

This day came the parties, plaintiff- and defendants, by their respective counsel, and on motion of plaintiffs, the mandate and opinion of the Supreme Court of the United States, reversing the orders and the final decree entered herein December 11, 1931, are filed of record, and pursuant to such mandate, it is now ordered and adjudged that the order and decree herein entered on December 11, 1931, be and every part thereof is hereby set aside, vacated and held for naught, and this cause is now reinstated upon the docket of the court for further proceedings in accordance with said mandate and the opinion of the Supreme Court.

By consent of parties, J. Dan Talbott, the present duly elected, qualified and acting Auditor of Public Accounts, is made defendant, individually and as such Auditor, in substitution for Clell Coleman, whose term of office has

expired; and in like manner, W. P. Sullivan, at present a duly appointed, qualified and acting member of the State Tax Commission, in succession to Henry M. Cline, whose [fol. 111] term of office has expired, is made a party defendant, individually and as such member of the State Tax Commission, in substitution for said Henry M. Cline.

Chas. H. Moorman, A. M. J. Cochran, Chas. I. Dawson.

Trabue, Doolan, Helm & Helm; Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plff. Bailey P. Wootton, Attorney General.

Dec. 10, 1932.

[fol. 112] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING INTERLOCUTORY INJUNCTION—Entered December 10, 1932

This day came the parties, plaintiffs and defendants, by their respective counsel, and the plaintiffs renewed their motion for an interlocutory injunction, made herein January 24, 1931.

Said motion having been heretofore heard and submitted, and the Court being sufficiently advised, it is considered, ordered and adjudged that said motion be sustained and that the defendants and each of them be, and each of them is hereby, enjoined and restrained, until the further order of court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this act."

[fol. 113] (2) From instituting or maintaining against the plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

The interlocutory injunction herein granted shall, until further order of court herein, continue in effect as to the plaintiffs and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of this cause by this Court, or until further order of Court herein.

To all of which the defendants and each of them object and except.

Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed, desiring to avail himself or itself of the benefit of said interlocutory injunction pending the final determination of this cause, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this order execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes accruing for the calendar years 1930, 1931 and 1932 under the Act assailed herein by plaintiffs, in the event [fol. 114] the validity of said Act should be finally established, and also against the loss of any interest or court costs or other proper charges that may be or become due from each such taxpayer under said Act.

The amount of any such bond given and the amount or value of securities or money deposited by the plaintiffs or by any taxpayer entitled hereunder to the benefit of the

interlocutory injunction herein granted, shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of the years 1930, 1931 and 1932, and said bond shall be secured by corporate surety or by a pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky, and if the parties can not agree upon the amount of such bond or the amount or character of such negotiable securities, then the amount of such bond or the amount and character of negotiable securities, and the pledge and deposit thereof, shall be as prescribed by the regular Judge of this Court, without the necessity of calling in the other two Judges for that purpose.

In the event the plaintiffs or any one of said taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted shall fail to execute such bond or to give such security as may be required of it or him or them, within thirty (30) days from the entry of this order, said interlocutory injunction as to such taxpayer so failing shall be thereupon immediately dissolved and it shall afford no further protection herein to such taxpayer.

Upon the execution by the plaintiffs or by any one of said listed taxpayers entitled hereunder to the benefit of the interlocutory injunction herein granted, of a bond secured as herein provided, or the making by the plaintiffs or such taxpayer of a pledge or deposit of securities as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be canceled as to all future liability, and any such pledge or deposit released as to all future liability, and all deposits of securities theretofore made by [fol. 115] the plaintiffs or by any such taxpayer shall be released, and such deposited securities shall be redelivered to the persons respectively depositing same.

December 10, 1932.

Chas. I. Dawson, Judge.

Have seen.

Trabue, Doolan, Helm & Helm; Nichol, Morrill, Wood, Marx & Ginter, Solicitors for Plaintiffs. Bailey P. Wootton, Atty. General. S. H. Brown, Assist. Atty. Gen. Francis M. Burke, Assist. Atty. Gen. Batson, Carey & Welch; Leslie W. Morris, Solicitors for Defts.

[fol. 116] IN UNITED STATES DISTRICT COURT

AGREED ORDER AMENDING ORDER ALLOWING INJUNCTION—
Entered December 20, 1932

By agreement of parties, it is now ordered that the order entered herein on December 10, 1932, granting an interlocutory injunction, be amended in the following particulars only:

(1) Plaintiffs or those taxpayers herein who have hitherto given bond for the payment of taxes accruing from sales for the calendar years 1930 and 1931 may, if they, or any of them, so elect, continue said bonds in force, and may give an additional bond for the estimated taxes accruing from sales made in the year 1932, said additional bond to be in all respects as required in said order of December 10, 1932, except as herein limited.

(2) Said bonds for the taxes accruing from sales for the calendar years 1930 and 1931 shall, in the event the taxpayer so elects, be and remain in full force and effect unless substituted bonds for the three years' taxes be filed in lieu thereof.

Dec. 20, 1932.

Chas. H. Moorman, Circuit Judge; A. M. J. Cochran, District Judge; Chas. I. Dawson, District Judge.

Bailey P. Wootton, Attorneys for Defendants. Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

[fol. 117] IN UNITED STATES DISTRICT COURT

In Equity. No. 611.

Amendment to Bill of Complaint—Filed February 18, 1933.

The plaintiff, by leave of Court, amends its Bill of Complaint herein in respect to the amounts hereinafter set out, and by way of amendment now makes the following averments:

Paragraph I

Amending Paragraph XI of the original Bill, plaintiff repeats the averments contained therein and in addition thereto states that in addition to paying its annual ad valorem taxes it has paid to the State of Kentucky corporation license taxes in the following additional sums:

$462.65 for the calendar year 1931
$512.15 for the calendar year 1932

Paragraph II

Amending and adding to the averments contained in Paragraph XIV of the original Bill, plaintiff states:

That during the calendar year 1931, the total gross retail sales made by the plaintiff in all its retail stores in Kentucky aggregated $2,169,523.59.

Applying thereto the rates of taxation prescribed by the challenged Act, and taking the credits allowed by said Act, would produce the following result in taxes claimed of the [fol. 118] plaintiff for the calendar year 1931:

1/20 of one per cent on first $400,000 of sales	$ 200.00 tax
2/20 of one per cent on next 100,000 of sales	100.00 tax
5/20 of one per cent on next 100,000 of sales	250.00 tax
8/20 of one per cent on next 100,000 of sales	400.00 tax
11/20 of one per cent on next 100,000 of sales	550.00 tax
14/20 of one per cent on next 100,000 of sales	700.00 tax
17/20 of one per cent on next 100,000 of sales	850.00 tax
One per cent on excess over $1,000,000 of sales	1,695.24 tax
Total tax above computed	$4,745.24
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	462.65
Next tax demanded of plaintiff for the year 1931	$4,282.59

That during the calendar year 1932, the total gross retail sales made by plaintiff in all its retail stores in Kentucky aggregated $1,924,550.86.

Applying thereto the rates of taxation prescribed by the challenged Act, and taking the credits allowed thereby, would produce the following result in taxes claimed of the plaintiff doing business as a partnership, for the calendar year 1932:

1/20 of one per cent on first $400,000 of sales	$ 200.00 tax
2/20 of one per cent on next $100,000 of sales	100.00 tax
5/20 of one per cent on next $100,000 of sales	250.00 tax

8/20 of one per cent on next $100,000 of sales	400.00	tax
11/20 of one per cent on next $100,000 of sales	550.00	tax
14/20 of one per cent on next $100,000 of sales	700.00	tax
17/20 of one per cent on next $100,000 of sales	850.00	tax
One per cent on excess over $1,000,000 of sales	9,245.51	tax
Total tax above computed	$12,295.51	
Credits allowed under Section 4 of Act, as per Paragraph I of this amendment	512.15	
Net tax demanded of plaintiff for the year 1932	$11,783.36	

Paragraph III

Amending Paragraph XIV of the original bill, plaintiff states that the same averments apply with full force and effect and are hereby restated with respect to the gross sales by plaintiff in each of the calendar years 1931 and 1932, and with respect to the taxes exacted of plaintiff for each of said years 1930, 1931 and 1932 under the chal-
[fol. 119] lenged Act.

Paragraph IV

Amending Paragraph XIV (second) and XV of the original bill, plaintiff reiterates and extends all the averments therein contained, to include and apply to the operation of said challenged Act during each of the calendar years 1930, 1931 and 1932, and likewise reiterates all of said averments with respect to the unjust and unequal discrimination effected by said Act between the plaintiff and the 25 other taxpayers listed of record as similarly situated and as protected by orders of the Court herein, on the one hand, and from 20,000 to 25,000 other competing retail merchants conducting a general retail store in Kentucky, on the other hand.

In addition thereto, plaintiff states that in its actual operation for the years 1930 and 1931, said challenged Act of 1930 has in fact produced the following results, as disclosed by the records of the State Tax Commission of Kentucky, which afford complete returns from all taxpayers with the exception of plaintiff and others listed by order of Court herein as entitled to the benefits of this litigation and of the restraining order heretofore granted herein:

Aside from the plaintiff and the 25 other taxpayers in the several classes represented in this litigation and pro-

tected by the restraining orders issued herein, it appears from records of the State Tax Commission that there are or were in the State of Kentucky 24,096 retail merchants who were required to and did make reports to said Commission for the calendar year 1930, and 20,084 retail merchants who were required to and did make reports to said Commission for the calendar year 1931.

The following summaries show the actual operation and effect of said challenged Act as to the taxpayers who have made the reports required of them under said Act, down to and including December 2, 1932:

Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1930

[fol. 120]

Number of reports filed by retail merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	24,061	16,374	7,687
Retail sales between $400,000 and $500,000	13	7	6
Retail sales between $500,000 and $600,000	8	5	3
Retail sales between $600,000 and $700,000	5	4	1
Retail sales between $700,000 and $800,000	4	2	2
Retail sales between $800,000 and $900,000	1	0	1
Retail sales between $900,000 and $1,000,000	0	0	0
Retail sales in excess of $1,000,000	4	3	1
Totals	24,096	16,395	7,701

Statement Showing Number of Retail Merchants Reporting for the Year 1930, Classified by Amounts of Tax Paid Pursuant to Reports

Number of taxpayers reporting tax less than 50¢	2,630
Number of taxpayers reporting tax 50¢ to $1.00	2,187

[fol. 121]

Number of taxpayers reporting tax $1.00 to $2.00	2,743
Number of taxpayers reporting tax $2.00 to $3.00	1,750
Number of taxpayers reporting tax $3.00 to $4.00	1,186
Number of taxpayers reporting tax $4.00 to $5.00	889
Number of taxpayers reporting tax $5.00 to $10.00	2,046
Number of taxpayers reporting tax $10.00 to $15.00	816
Number of taxpayers reporting tax $15.00 to $20.00	429
Number of taxpayers reporting tax $20.00 to $25.00	342
Number of taxpayers reporting tax $25.00 to $50.00	495
Number of taxpayers reporting tax $50.00 to $100.00	175
Number of taxpayers reporting tax $100.00 to $200.00	60
Number of taxpayers reporting tax $200.00 to $300.00	6
Number of taxpayers reporting tax $300.00 to $400.00	4
Number of taxpayers reporting tax $400.00 to $500.00	1
Number of taxpayers reporting tax $500.00 to $600.00	0
Number of taxpayers reporting tax $600.00 to $700.00	2
Number of taxpayers reporting tax $700.00 to $800.00	1
Number of taxpayers reporting tax over $1,000.00	3
Total	15,765
Undetermined and unclassified	630
Total	16,395

Number of merchants reporting sales of—	Showing tax liability	Showing no tax liability
Less than $10,000.00	8,784	5,353
$10,000.00 and under $25,000.00	4,431	1,553
$25,000.00 and under $50,000.00	1,905	507
$50,000.00 and under $75,000.00	596	148
$75,000.00 and under $100,000.00	241	45
$100,000.00 and under $150,000.00	216	40
$150,000.00 and under $200,000.00	90	19
$200,000.00 and under $250,000.00	48	12
$250,000.00 and under $300,000.00	27	3
$300,000.00 and under $400,000.00	36	7
Over $400,000.00	21	14
Total	16,395	7,701

Analysis of Reports Showing Tax Liability

	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown in excess of tax liability
Sales less than $400,000	24,061	$338,870,755.00	$167,214.07	$78,211.02	$89,003.05	$222,674.01
Sales between $400,000 and $500,000	13	5,866,935.00	3,454.81	2,193.44	1,261.37	6,709.42
Sales between $500,000 and $600,000	8	4,416,568.00	3,440.42	2,123.02	1,317.40	5,306.50
Sales between $600,000 and $700,000	5	3,234,563.00	3,266.68	1,498.12	1,768.56	177.20
Sales between $700,000 and $800,000	4	2,989,019.00	4,110.66	2,727.57	1,383.09	2,298.47
Sales between $800,000 and $900,000	1	814,559.00	636.15	636.15	0	1,755.24
Sales between $900,000 and $1,000,000	0	0	0	0	0	0
Sales in excess of $1,000,000	4	5,329,123.00	25,491.24	14,099.48	11,391.76	4,593.15
Total	24,096	$361,521,522.00	$207,614.03	$101,488.80	$106,125.23	$243,513.99

[fol. 122] Summary of Reports to Kentucky State Tax Commission Relative to Gross Retail Sales in Calendar Year 1931

Number of reports filed by retail merchants showing—	Number filed	Number indicating tax	Number indicating no tax
Retail sales less than $400,000	20,053	11,992	8,061
Retail sales between $400,000 and $500,000	10	6	4
Retail sales between $500,000 and $600,000	9	6	3
Retail sales between $600,000 and $700,000	3	3	0
Retail sales between $700,000 and $800,000	2	1	1
Retail sales between $800,000 and $900,000	3	2	1
Retail sales between $900,000 and $1,000,000	2	2	0
Retail sales in excess of $1,000,000	2	2	0
Totals	20,084	12,014	8,070

Analysis of Reports Showing Tax Liability

	Number of returns	Gross sales	Gross tax	Credits allowed	Net tax	Credits shown on reports in excess of tax liability
Sales less than $400,000	20,053	$286,786,721.00	$143,464.51	$77,551.95	$65,912.56	$173,735.79
Sales between $400,000 and $500,000	10	4,520,653.00	2,520.64	1,513.05	1,007.59	3,260.06
Sales between $500,000 and $600,000	9	4,887,385.00	3,572.59	2,212.57	1,360.02	5,699.06
Sales between $600,000 and $700,000	3	1,927,791.00	2,161.17	700.00	1,461.17	.....
Sales between $700,000 and $800,000	2	1,472,166.00	2,296.25	1,391.17	905.08	3,109.00
Sales between $800,000 and $900,000	3	2,549,814.00	5,548.72	2,429.98	3,118.74	237.08
Sales between $900,000 and $1,000,000	2	1,895,680.00	5,213.29	1,084.94	4,128.35	.....
Sales in excess of $1,000,000	2	2,389,404.00	9,994.07	3,607.85	6,386.22	.....
Totals	20,084	$306,429,614.00	$174,771.24	$90,491.51	$84,279.73	$186,040.99

[fol. 123] Paragraph V

Amending Paragraph XXVIII of its original bill of complaint, plaintiff repeats the averments therein contained, and in addition thereto, it makes the following averments:

For more than ten years past, there has been a constantly increasing deficit in said General Fund, which has been continuously during said period, and is now, wholly insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against and payable out of it, and by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

In addition thereto, there are many other undisputed claims against the General Fund which have been held up for long periods of time in the office of the Auditor and for which no warrants have been issued by the Auditor although such claims are properly allowable and payable out of the General Fund. Without a prolonged and expensive accounting, it is impossible to state the amount of such claims for which no warrants have been issued, but they aggregate a large sum of money, amounting to many thousands of dollars.

By Sections 4688a-1, a-2 and 2-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea, Treasurer, v. Newman, 153 Ky. 604, and in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued and as money appropriated and available for the purposes of the General Fund reaches the treasury.

The effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time shall be paid in priority to warrants drawn later in point of time, and if the payment thereof exhausts the General Fund, warrants [fol. 124] subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

By Section 4688a-1, Kentucky Statutes, it is provided

that the State Treasurer shall receive and redeem warrants issued against the Auditor

"if there be sufficient money in the treasury appropriated for that purpose."

If there is no money in the General Fund available for the payment of such warrants in the order prescribed by law, the State Treasurer can not pay such warrants, and the Courts can not by mandamus compel him to pay same, as was held by the Court of Appeals of Kentucky in Bosworth, State Treasurer, v. Shuck, 118 Ky. 458.

The mounting deficit in the General Fund was recognized by the General Assembly of Kentucky at its 1924 session by the enactment of Chapter 122, Acts of 1924, which submitted to a vote of the people a bond issue of $6,000,000 to pay warrants then outstanding against the General Fund. Such bond issue was defeated at the polls.

At its 1926 session, the General Assembly enacted Chapter 13 of the Acts of 1926, submitting to the people of the State, for a vote, a bond issue of $4,000,000 for the purpose of raising money with which to pay warrants against the General Fund then outstanding. This bond issue was likewise defeated at the polls.

At the time the challenged Act was in process of enactment, it was a notorious fact, which was well known to the members of the General Assembly and to the officials of the State, that warrants drawn against the General Fund for the refund of taxes prescribed in said Act could not and would not be paid out of said Fund for several years, and, knowing these facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund. The only provision made for the payment of warrants theretofore outstanding was to enact the challenged law and therein to appropriate one-half the taxes exacted [fol. 125] thereunder, to the payment of the then existing indebtedness of the Commonwealth, it being already provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

At the time these suits were brought, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931, less

minor accounts, was $12,565.81, as against which fund there were at the time outstanding warrants, theretofore issued, aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts and had been presented for payment but were not paid for lack of funds.

At its 1932 session, the General Assembly of the Commonwealth of Kentucky again recognized and declared the insolvency of the General Fund and its insufficiency to pay outstanding warrants issued against it by the Auditor of Public Accounts. Accordingly it enacted Chapter 20 of the Session Acts of 1932, the title of which Act reads in part as follows:

"An Act authorizing the funding of certain indebtedness of the Commonwealth of Kentucky which is evidenced by outstanding state warrants, by the issuing of funding bonds and acknowledging and confirming the validity of such warrants and the indebtedness evidenced thereby."

In the preamble and body of said Act, the General Assembly ascertained and declared the following facts:

(1) That there were then outstanding warrants beginning with warrant No. A 49, dated July 5, 1927, and including all unpaid interest thereon.

(2) That there was then no money in the State treasury available for the payment of such warrants, or any part thereof.

(3) That some of such warrants have been issued and outstanding for approximately five years.

In State Budget Commission v. Lebus, 244 Ky. 701, 714, [fol. 126] the Court of Appeals affirmed a judgment of the Franklin Circuit Court, holding invalid said Chapter 20 of the Session Acts of 1932, on the ground that it did not provide for submitting the proposed bond issue to a vote of the people, as required by the State Constitution.

The facts with respect to the condition of the General Fund are now, and for years past have been, as above declared by the General Assembly in the Acts hereinbefore set forth, excepting that the deficiency in the said General Fund has shown a progressive increase and there is no prospect of such deficiency being reduced.

Since the adjournment of the 1932 session of the General Assembly, the deficiency in the General Fund has constantly increased and, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11 as of October 31, 1932, and there was no money whatever in the General Fund, but, on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48.

By reason of the facts hereinbefore set forth, a warrant against the General Fund which plaintiff might obtain under Section 10 of the challenged Act at the end of such litigation as is authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

By reason of such insolvency of the General Fund, warrants drawn against it cannot be collected with reasonable or any promptness, and they cannot be sold except at a discount of from 10 to 15 per cent of their face value.

This fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who [fol. 127] gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

In said action, the defendant Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State warrants against the General Fund, that such warrants on such market were worth 87 to 88 cents on the dollar, but that there was not a ready market for them at any price, and his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, outstanding warrants would sell at 75 per cent of face value.

In like manner, the defendant John B. Lewis, at the same time and place, stated under oath that the last sale of State warrants that he knew of was made at 90 cents on the dollar; and he added that he understood buyers

were not offering 90 then, but were offering a little less than that. He also stated that in the event said Funding Act should be held invalid—as it was held by the Courts—the warrants would go considerably lower, and he believed they would go below 75 cents on the dollar of face value.

Plaintiff states that it is now extremely difficult to find a purchaser for State warrants drawn by the Auditor of Public Accounts against the General Fund of the State, and that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value.

Plaintiff says that no State warrants against the General Fund have been called for payment that have been issued since July 31, 1927, and in his deposition, given at the time and place and in the case above referred to, the defendant Seldon R. Glenn, under oath, stated that the last call of warrants was made as of July 8, 1931, and it called for warrants that had been issued between June 12, 1927, and [fol. 128] July 1, 1927, inclusive.

On the average, throughout the last eight or ten years, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years after issue thereof, on account of the lack of funds legally available therefor. The only exceptions to this general rule are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Had the plaintiff herein paid the taxes exacted of it under the challenged Act as and when due in February, 1931, and February, 1932, and had the defendants been required to issue warrants for the refund of said taxes as provided in Section 10 of the challenged Act, the plaintiff herein, under the law of the State as construed and applied by the Court of Appeals, would have been compelled ever since to hold said warrants, and would still be required to hold said warrants for years to come, unpaid, or to endeavor to sell same at a great discount, in addition to the loss of interest on said tax money, and plaintiff would not have had at the time of filing this bill, and it has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged Act or any other Act of the Commonwealth of Kentucky.

The Commonwealth of Kentucky itself, under the advice of its Attorney General, declines to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as the payment of jurors in the Circuit Courts of the State, and in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for [fol. 129] a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials. As a matter of fact, the State Treasurer of Kentucky has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932.

In the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, and the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund *for the year* of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Moreover, in said report, the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget",

and added:

"Since this law-making body holds the power of appropriating state funds and of fixing the tax rate to be levied

for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Paragraph VI

Amending Paragraph XXIX of its original bill, plaintiff repeats the averments therein contained and extends such averments to include and apply to taxes and penalties claimed of plaintiff on account of its gross sales for the calendar years subsequent to 1930, the amounts of such [fol. 130] gross sales and resulting taxes being set forth in Paragraph II of this amendment.

Wherefore, having amended its bill in the respects hereinbefore set forth, plaintiff prays as in its original bill of complaint, and for all other proper and equitable relief.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 131] In United States District Court

In Equity. No. 611

Answer to Amendment to Bill of Complaint—Filed April 14, 1933

Come the defendants and by leave of court, without waiving their objection heretofore made to the filing of plaintiff's amended bill of complaint, for answer to same plead as follows, to-wit:

Paragraph I

Defendants say that they repeat all of the averments, denials, and statements contained in their answer to Paragraph X of the original bill of complaint, and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief, and therefore neither admit nor deny the allegations contained in the second literary paragraph of paragraph I of the amendment to said original paragraph, but require strict proof thereof.

Paragraph II

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof [fol. 132] thereof.

Paragraph III

Defendants repeat all of the averments and denials contained in their answer to Paragraph XIV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph IV

Defendants repeat all of the averments and denials contained in their answer to Paragraph XV of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph V

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXVIII of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

For further answer defendants deny that for more than ten years past, or at all, there has been a constantly increasing deficit in the General Fund of the Commonwealth,

or that same has been continuous during said period or at all, or is now insufficient to meet the warrants drawn upon it by the Auditor of Public Accounts in discharge of claims properly allowable against or payable out of it, or that by reason thereof, holders of warrants drawn against it have been compelled to hold the same for as much as five years or at all, awaiting the accumulation in the General Fund of funds sufficient to pay such warrants in their proper sequence as provided by law.

Defendants deny that in addition thereto or at all there are many other undisputed claims against the General [fol. 133] Fund, or that such claims have been held up for a long period of time in the office of the Auditor of Public Accounts, or that no warrants have been issued by the Auditor although such claims are properly allowable or payable, or are allowable or payable, out of the General Fund. Deny that without a prolonged or expensive accounting, it is impossible to state the amount of such claims for which warrants have been issued, or that they aggregate a large or any sum of money, or that they amount to many thousands of dollars or any dollars.

Deny that by Sections 4688a-1, a-2, or a-4, Kentucky Statutes, as construed by the Court of Appeals of Kentucky, in the case of Rhea Treasurer v. Newman, 153 Ky. 604, or in Bosworth, State Treasurer v. Shuck, 118 Ky. 458, or that in any case, it is made the duty of the State Treasurer to pay outstanding warrants against the General Fund, in the order in which they were issued or as money appropriated or available for the purposes of the General Fund reaches the treasury.

They further deny that any moneys paid in to the General Fund from the operation of the Act in question will have to be paid out or refunded with regard to other monies in such fund.

Deny that the effect of this statute, as construed by the Court of Appeals, is to require that unpaid warrants against the General Fund drawn first in point of time should be paid in priority to warrants drawn later in point of time, or that if the payment thereof exhausts the General Fund, warrants subsequently issued must await their turn in serial order before payment thereof can be compelled by process of law.

Deny that at the time the challenged act was in process

of enactment, or at any time, that it was a fact, or that such a fact was well known, to the members of the General Assembly or to the officials of the State, or to any one, that warrants drawn against the General Fund for the refund of taxes, as prescribed in said Act, could not and would not be paid out of said fund for several years, or that there was any delay in the payment of said refund, and state that [fol. 134] said refunds were always and have been always promptly paid.

Deny that knowing these facts, or that such were the facts, the General Assembly made no provision to levy any tax for the augmentation of the General Fund, but say that the General Assembly did augment the General Fund by the Act in question. Deny that the only provision for the payment of warrants theretofore outstanding was to enact the challenged law or therein to appropriate one-half the taxes exacted thereunder for the payment of the then existing indebtedness of the Commonwealth, or that there was any existing indebtedness, or that it was only provided by law that such payments should be applied on warrants in sequence according to their respective dates of issue.

They say that other laws were passed which were calculated to and did bring vast sums of revenue, which revenue was paid into the General Fund.

Defendants deny that at the time these suits were brought, or at all, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky, or at all, as of January 1, 1931, the amount of money in the General Fund on January 1, 1931 less minor accounts, was $12,565.81, or that as against said Fund there was at the time outstanding warrants theretofore issued aggregating $9,880,502.76, which had been drawn against the State Treasurer by the Auditor of Public Accounts, or had been presented for payment, or were not paid for lack of funds.

Deny that the 1932 Session of the General Assembly of Kentucky recognized or declared the insolvency of the General Fund or its insufficiency to pay outstanding warrants issued against the Auditor of Public Accounts, or for that reason it enacted Chapter 20 of the Session Acts of 1932. [fol. 135] Deny that the facts with respect to the condition of the General Fund are now, or for years past, or at all, have been as above declared by the General Assembly in the Acts hereinbefore set forth, or that the deficit in the

General Fund has shown a progressive increase or there is no prospect of such deficiency being reduced.

Deny that since the adjournment of the 1932 General Assembly, or at all, the deficit in the General Fund has increased, or as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of November 1, 1932, the amount of the then outstanding warrants drawn by the Auditor of Public Accounts upon the General Fund of the Commonwealth was $14,279,558.11, or any sum, or that as of October 31, 1932, or there was no money whatever in the General Fund, or that on the contrary, it had been overdrawn by reason of its indebtedness to other funds of the State in the sum of $275,261.48, or at all, or in any sum, or that by reason of the facts above alleged, or at all, upon or against the General Fund which plaintiff might obtain under such intention of the challenged act, at the end of any litigation as authorized therein could not, consistently with the law of the State as expounded by the Court of Appeals, be paid out of said General Fund for several years.

Deny that by reason of such insolvency of the General Fund, Warrants drawn against it can not be collected with reasonable or with promptness, or that they can not be sold except at a discount of 10% or any per cent of their face value.

Deny that said fact has been recognized by the defendants herein, members of the State Tax Commission of Kentucky, who gave their depositions in the Franklin Circuit Court in the suit above referred to, which reached the Court of Appeals of Kentucky as State Budget Commission v. Lebus, 244 Ky. 701, 714.

[fol. 136] Deny that in said action, the defendant, Seldon R. Glenn, under oath, stated in his deposition, given at the State Capitol on May 23, 1932, that he was familiar with the present market for State Warrants against the General Fund, or that such warrants on such market were worth 87 to 88 cents on the dollar, or that there was not a ready market for them at any price, or his opinion was that, unless something is done to relieve the situation, such as upholding the validity of the 1932 Funding Act held void by the Courts, before September, 1932, or at all, outstanding warrants would sell at 75 per cent of face value.

Defendants state that in any event said warrants have

never reached the price above indicated, but now are selling between 95 cents and 100 cents on the dollar.

Deny that in like manner or at all the defendant, John B. Lewis, at the same time and place stated under oath that the last sale of State Warrants that he knew of was made at 90 cents on the dollar; or that he heard they were not offering 90 then, or were offering a little less than that.

Deny that he also stated that in the event said Funding Act should be held invalid, the warrants would go considerably lower, or that he believed they would go below 75 cents on the dollar of face value.

Deny that it is extremely difficult to find a purchaser for State Warrants drawn by the Auditor of Public Accounts against the General Fund of the State, or that if and when a purchaser can be found it is impossible to realize upon a sale of such warrants a sum in excess of 80 to 90 per cent of their face value, but state upon the other hand, such warrants have a ready sale at from 95 cents to par, and the same are regarded as a prime investment.

[fol. 137] Defendants deny that no state warrants against the General Fund have been called for payment that have been issued since July 31, 1927, or that in his deposition, given at the time and place and under oath, stated that the last call of warrants was made as of July 8, 1931, or that it called for warrants that had been issued between June 12, 1927 and July 1, 1927, inclusive.

Deny that on the average, throughout the last eight or ten years, or at all, interest-bearing State warrants drawn against the General Fund have been delayed in payment approximately five years, or at all, after issue thereof, on account of the lack of funds legally available thereof, or the only exceptions are those made in disregard of the rule of law prescribing the order of payment, because of special circumstances deemed sufficient to excuse or palliate such disregard.

Deny that had the plaintiff herein paid the taxes exacted of it under the challenged act as and when due in February, 1931, and February, 1932, or had the defendants been required to issue warrants for the refund of said taxes as provided in section 10 of the challenged Act, the plaintiff herein, under the law of the State, as construed or applied by the Court of Appeals, would have been compelled ever

since to hold said warrants for years to come, or at all, unpaid or to endeavor to sell same at a great or any discount, in addition to the loss of interest on said tax money, or that there would be any loss of interest on said tax money, or that plaintiff did not have had at the time of the filing of this bill, or has not since had, any adequate remedy at law for obtaining a refund thereof under said challenged act, or any other Act of the Commonwealth of Kentucky.

Deny that the Commonwealth of Kentucky itself, under the advice of its Attorney General, or at all, declined to accept its own warrants in payment of its demands for taxes, even though such warrants may have been issued for necessary governmental purposes, such as payment of ju- [fol. 138] rors in the circuit courts of the State, or that in point of fact, the executive officers of the State, in charge of its finances, have recently made public announcement of the fact that they intended, on behalf of the State, to apply to the Reconstruction Finance Corporation, organized under Act of Congress, for a loan to the State of Kentucky of a large sum of money to enable the State to meet its daily recurring governmental obligations in the matter of salaries of public officials.

Deny that the State Treasurer has only been able to pay salary checks of public officials through the expedient of encroaching upon other funds for the benefit of the General Fund, as shown by the overdraft in the General Fund hereinbefore set forth, as officially reported as of November 1, 1932; or that there is any overdraft in the General Fund as of November 1, 1932, or at all.

Deny that in the opening paragraph of its annual report to the Governor of Kentucky for the year 1931, the State Tax Commission of Kentucky called his attention to the condition of the General Fund, stating that the General Assembly, at its 1930 session, had enacted certain legislation transferring approximately one-half million dollars from the General Fund and providing for large appropriations made in favor of the School Equalization Fund, with no provision to pay same other than to issue warrants against the General Fund, or the Commission emphasized the fact that such legislation

"naturally caused an unprecedented deficit in the General Fund for the year of over $2,500,000.00."

thus adding to the deficiency in said fund theretofore existing.

Deny that in said report the State Tax Commission criticized

"the utter disregard of the General Assembly in late years for a balanced budget,"

or added:

"Since this law-making body holds the power of appro- [fol. 139] priating state funds and of fixing the tax rate to be levied for state purposes, it remains to be seen if any power, however great, can balance a state budget without their cooperation."

Paragraph VI

Defendants repeat all of the averments and denials contained in their answer to Paragraph XXIX of the original bill of complaint and in addition thereto and in further answer to said paragraph as amended, they say that they have not sufficient information to form a belief and therefore neither admit nor deny the averments contained in the amendment to said paragraph but require strict proof thereof.

Paragraph VII

Defendants repeat, reiterate, and rely upon each and every defense made in their original action.

Wherefore, defendants pray as in their original answer.

Bailey P. Wootton, Attorney General. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General.

Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 140] In United States District Court

In Equity. No. 611

Second Amended Answer—Filed July 6, 1933

Come the defendants, by leave of Court, and for further answer to plaintiff's petition, as amended, plead as follows:

Paragraph I

Defendants say that plaintiff has a plain, adequate, complete and speedy remedy at law. That under the provisions of section 10 of the act challenged, as construed by the court of highest resort of Kentucky, plaintiff could sue for and recover any taxes improperly paid under any of the provisions of said act; that in the event of a judgment for the recovery of any such taxes, said judgment could and would be paid from the general expenditure fund of the Commonwealth of Kentucky, within a reasonable time after the rendition thereof.

Defendants state that the receipts in the said general expenditure fund, as shown by the official reports of the Treasurers of the Commonwealth of Kentucky, for each of the fiscal years 1926 to 1932 inclusive, have been as follows:

[fol. 141]

For	the	fiscal	year	ending	June	30,	1926....	$7,706,538.28	
"	"	"	"	"	"	"	1927....	8,059,517.85	
"	"	"	"	"	"	"	1928....	9,294,798.97	
"	"	"	"	"	"	"	1929....	9,907,769.29	
"	"	"	"	"	"	"	1930....	12,949,027.10	
"	"	"	"	"	"	"	1931....	11,573,065.01	
"	"	"	"	"	"	"	1932....	10,000,000.00	(approximately)
"	"	"	"	"	"	"	1933....	9,000,000.00	(approximately)

(Official Treasurer's report for the fiscal years 1932 and 1933 not yet published.)

Defendants say that there will be collected under the tax laws of this State and paid into the said general expenditure fund approximately Eight Million Dollars for the fiscal year ending June 30, 1934; that a great portion of said sum is already due and in process of collection; that in fact there is approximately Seven Million Dollars now due the general expenditure fund of the Commonwealth of Kentucky against which there are no preferred claims; that money is constantly flowing into the said general expenditure fund from the operation of tax laws in force in this Commonwealth; that any judgment for refund of taxes paid by this plaintiff under the provisions of the challenged act will be a preferred claim against said general fund, under the laws of this Commonwealth as construed by the courts of this State.

Paragraph II

For a separate and distinct defense in point of law arising upon the face of the bill of complaint as amended herein, defendants say that the facts alleged in said bill of complaint as amended are insufficient to constitute a valid cause of action.

Wherefore, defendants pray as in their original answer.
Bailey P. Wootton, Attorney General of Kentucky. S. H. Brown, Assistant Attorney General. Francis M. Burke, Assistant Attorney General.

Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky.

[fol. 142] In United States District Court

No. 611

Stipulation as to Hearing—Filed July 24, 1933

In the above-styled case it is stipulated by the parties, plaintiff and defendants, as follows:

(1) Upon the final hearing of this case, the parties, plaintiff and defendants, respectively, may read in evidence, as if they were depositions regularly taken on due notice to the opposing side, any or all of the ex parte affidavits heretofore filed or read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein, and may also read in evidence all depositions heretofore taken and filed and heretofore read in evidence upon the hearing of plaintiff's motion for an interlocutory injunction herein,

Subject, however, in the case of such affidavits and depositions,

(a) to exceptions for competency and relevancy of the subject-matter or any portion thereof contained in any of said ex parte affidavits, and

(b) to the right of the adverse party, on due notice, to cross-examine orally any witness whose ex parte affidavit is so offered or read in evidence.

(2) The plaintiff shall conclude the taking of proof on its behalf, including the cross-examination of witnesses whose ex parte affidavits have been heretofore filed, on or before June 10, 1933.

[fol. 143] All objections to mere matters of form or to the ex parte character of affidavits heretofore filed on the motion for an interlocutory injunction, and all objections on account of the ex parte character thereof, are waived, and all formalities as to the cross-examination of witnesses giving such affidavits are hereby waived.

(3) Subject to all the provisions of this stipulation, all the evidence offered or heard in this case or in the case of Kroger Grocery and Baking Company v. John B. Lewis, et al., No. 3908, filed in the Eastern District of Kentucky, or in the cases of Fred Levy, et al. v. John B. Lewis, et al., No. 610, and J. C. Penney Company v. John B. Lewis, et al., No. 611, filed in the Western District of Kentucky, may be read in this case or in any one or all of the other three cases.

(4) The defendants shall conclude the taking of depositions or the cross-examination on their behalf of plaintiff's witnesses, on or before June 25, 1933.

(5) On or before the 10th of June, 1933, each party shall give to the adverse party or parties a written notice specifying the ex-parte affidavits proposed to be read by such party upon the final hearing and no ex parte affidavits other than those so specified shall be read on behalf of such party or parties.

(6) It is further stipulated that the following statement made up from the record of the State Treasurer of Kentucky by Jerry King, Bookkeeper in the State Treasurer's Office correctly sets forth as to each of the dates below given

(a) the balance to credit of General Fund, and

(b) outstanding warrants against the General Fund as follows:

[fol. 144]

Date	Balance to credit of general fund	Outstanding warrants against general fund
June 30, 1922	$297,967.85	$4,702,709.11
June 30, 1923	2,590,470.14	5,947,750.40
June 30, 1924	167,535.74	4,089,151.37
June 30, 1925	310,242.68	4,127,746.17
June 30, 1926	10,387.44	4,329,772.33
June 30, 1927	257,566.83*	4,664,820.89
June 30, 1928	440,328.14	6,715,347.99
June 30, 1929	1,880,084.77	8,060,920.69
June 30, 1930	1,826,244.05	8,533,384.79
Dec. 31, 1930	1,250,168.22	9,880,501.76
June 30, 1931	2,440,128.36	11,023,911.53
Dec. 31, 1931	838,269.63	12,637,990.48
June 30, 1932	1,302,267.69	13,851,414.57
Dec. 31, 1932	573,831.32	14,415,503.69
May 25, 1933	1,898,229.25	14,668,744.57

* (Deficit.)

(7) It is understood that neither side shall be required to produce for cross-examination by the adverse party any witness whose ex parte affidavit may be offered or read under this stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, S. H. Brown, Solicitors for Defendants.

[fol. 145] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY DEFENDANT—Entered August 21, 1933

This day came the parties herein and filed a stipulation noting that the defendant Selden R. Glenn had resigned as a member of the State Tax Commission of Kentucky and was no longer a member of the said State Tax Commission, and was succeeded therein by Emerson Beauchamp.

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that Emerson Beauchamp, member of the [fol. 146] State Tax Commission of the Commonwealth of Kentucky, be and he is hereby substituted as a defendant herein in lieu of the defendant Selden R. Glenn, and with the same effect as if he had been originally a defendant to the Bill of Complaint herein, and said cause is continued and maintained against the said Emerson Beau-

champ individually and as a member of the State Tax Commission of the Commonwealth of Kentucky.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 147] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Entered August 21, 1933

This day the above-styled three cases came on for hearing before Hon. Xenophon Hicks, Circuit Judge, Hon. A. M. J. Cochran, District Judge, and Hon. Chas. I. Dawson, District Judge.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants pending in the Eastern District of Kentucky, and heard at the same time.

By agreement of parties plaintiff and defendant, the proof heard and all exhibits filed as set out in the order of submission herein, dated February 14, 1931, was likewise read and heard upon the final submission hereof, together with the stipulation filed in these cases in the Clerk's office on or about July 24, 1933, and now filed by order of Court.

In addition to the said evidence, plaintiffs by counsel filed and read the depositions and exhibits therewith of

W. P. Sullivan,
W. R. Robinson,
A. H. Brendel,
Albert H. Morrill,
Harry W. Schacter.

[fol. 148] Plaintiffs likewise read in evidence the following Statutes and Acts of the General Assembly of Kentucky and decisions of the Court of Appeals of Kentucky, as set out in their amended bills herein:

Ky. Stat. Sec. 3688a-1, a-2 and a-4;
Rhea, Treas., v. Newman, 153 Ky. 604;
Bosworth, Treas., v. Shuck, 118 Ky. 458;

Chap. 13 of the Acts of the General Assembly of Ky. of 1926;

Chap. 20 of the Acts of the General Assembly of Ky. of 1932;

State Budget Commission v. Lebus, 244 Ky. 701;

and certain paragraphs of the Report of the State Tax Commission of Kentucky for the year 1931, as set out in the amended bill.

Likewise defendants filed and read the depositions and exhibits therewith of

Jerry King,
James W. Martin,
Clyde William Phelps,
Selden R. Glenn,
R. C. Ilg,
Elam Huddleston.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted, and the Court not being fully advised takes time.

It is further ordered and adjudged that the interlocutory injunctions heretofore entered in each of the above-styled cases be and the same are hereby continued in full force and effect until the final determination of each of the above-styled cases in this Court.

Aug. 21, 1933.

Xen. Hicks, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

Have seen the foregoing order.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; Homer W. Batson, Leslie W. Morris, Solicitors for Defendants.

[fol. 149] IN UNITED STATES DISTRICT COURT

In Equity. No. 611

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed September 20, 1934

This case having been heard with the case of The Stewart

Dry Goods Company v. John B. Lewis et al. (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiffs' motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff. B. P. Wootton, Atty. Gen.; S. H. Brown, Solicitor for Defendants.

[fol. 150] IN UNITED STATES DISTRICT COURT

Before Hicks, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 20, 1934

DAWSON, District Judge:

These three cases are before us on final submission and each of them involves the validity of Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants Gross Sales Tax Act. The case of Kroger Grocery & Baking Company v. John B. Lewis, et al., in the Eastern District of Kentucky, and involving the same questions, was heard and considered by us at the same time. On a former hearing of these cases we dismissed the petitions on the ground that the plaintiffs had an adequate remedy at law. An appeal was taken to the Supreme Court, and that court held that, in view of the allegations of the bills as to the condition of the General Expenditure Fund of the State, it could not be said, in the absence of proof controverting the allegations of the bills, that Section 10 of the Act upon its face afforded an adequate remedy at law. In reversing the case, the Court said:

[fol. 151] "The decrees are reversed and the causes remanded to the District Courts, of three judges, for final

hearing upon the merits, without prejudice to a determination upon evidence with respect to the questions of the status of outstanding warrants upon the General Fund in the State Treasury, and whether warrants of the sort contemplated by Section 10 of the Act in question are accorded preference in payment over other warrants, and the basis, if any, for the assurance that such preference will be continued so that in the event of actions by the plaintiffs at law under Section 10 they would be afforded a certain, reasonably prompt and efficacious remedy."

We have interpreted this language of the Court to authorize us to again consider the question of the adequacy of the remedy at law under Section 10 of the Act in the light of such proof as might be offered by the parties on this subject.

Proof has been taken on this question which establishes the fact that the uniform practice of the Treasurer of the Commonwealth of Kentucky has been to pay warrants issued by the Auditor for the refund of taxes when presented, and in advance of outstanding interest-bearing warrants, and that such has been the practice of the present Treasurer of the Commonwealth of Kentucky, whose term of office does not expire until January, 1936. It is further established by the evidence that the present State Treasurer has followed the practice of keeping himself in financial position to refund all taxes which are paid under legal protest, and that he will be in a position to and will do so with reference to the taxes involved in these actions in event it shall be finally determined that such taxes were illegally collected, notwithstanding the fact that there were outstanding as of June 30, 1933, approximately fifteen million dollars of interest-bearing warrants against the General Expenditure Fund, out of which fund Section 10 of the Act directs refunds under the Act to be made. We know of no opinion of the Court of Appeals of Kentucky giving its sanction to this practice, nor does the record disclose that the Attorney General of the State has ever ruled that the practice was authorized by any statute of the State. Certainly the practice is consonant with common justice; but in view of the doubt expressed by the Su- [fol. 152] preme Court as to whether Section 10 of the Act authorizes such preferential treatment, and in view of

the further fact that if refunds under the Act are not given preference it is uncertain when they would be paid, we feel constrained to hold that the remedy at law given by Section 10 of the Act does not afford that certainty necessary to repel equity jurisdiction.

We therefore come to a consideration of the merits of the cases.

The pertinent provisions of the Act are:

"Section 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, co-partnership or corporation opening, establishing, operating or maintaining any 'store', as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store', as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this State which are owned, operated, maintained or controlled by the same 'retail merchant', as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail merchant' and 'store', as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

Section 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining, of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

One-twentieth of one per cent of the gross sales of Four Hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five Hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dol-

lars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand [fol. 153] ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

Section 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter.

In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

Section 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax [fol. 154] levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein."

Plaintiffs contend that the Act violates the Fourteenth Amendment to the Federal Constitution in that it denies them the equal protection of the law and deprives them of their property without due process of law; that it violates the Federal Constitution in that it discriminates against and burdens interstate commerce, and that it violates the Bill of Rights of the State Constitution, which prohibits the exercise of arbitrary power over the lives, liberty and property of citizens and secures to all the inalienable right of acquiring and protecting property, and is so arbitrary and confiscatory as to be unauthorized as an excise or license tax under Section 181 of the Constitution. Some claim is also made that it violates other provisions of the Constitution of Kentucky, but these contentions apparently are not seriously urged, and we shall not notice them.

Does the Act Deny to the Plaintiffs the Equal Protection of the Law?

It is the contention of the plaintiffs that equal protection of the law under the Fourteenth Amendment is denied by the Act because:

(1) The classification of the persons taxed into eight different groups, according to the amount of gross sales, and a corresponding stepping up of the rate, is not justified

by any conceivably substantial distinction between the classes, but is wholly arbitrary and discriminatory.

(2) The credits allowed by Section 4 of the Act operate, in most cases, to exempt from the tax those falling in the class having annual gross sales of less than $400,000,000, and that this section also operates to give a preference to [fol. 155] those entitled to such credits over those taxpayers who have no special license or excise taxes upon which to claim the credits authorized by Section 4.

It should always be remembered that the power of the State to tax for public purposes within its constitutional sphere is as unlimited as is the power of the National Government within its sphere, except for the equality clause of the Fourteenth Amendment.

It has often been written that the equal protection provision of the Fourteenth Amendment is not a guarantee of equality of the operation or application of State legislation upon all the citizens of a State. All that it intends to secure to citizens is that the laws of a State shall have equality of operation and application on persons according to their relations. That is to say, it is a guarantee to every citizen that he shall be accorded the same treatment by the laws of his State as is accorded to other citizens in his class and similarly circumstanced. As applied to taxation, it has been repeatedly declared by the Supreme Court that this provision of the Constitution does not prohibit classification further that that the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. The exemption of certain classes of property from taxation, or the imposition of different rates of taxation upon different classes of property or persons, is not prohibited by the equal protection provision of the Fourteenth Amendment, provided the classification is not unreasonable or arbitrary; and this is true as to excise, license and occupational taxation, as well as property taxation. It is not necessary that the classification shall be one that appeals to the judgment or sense of fairness of courts. It is enough if the classification is reasonably founded on the "purposes and policies [fol. 156] of taxation." Generally speaking, the judgment of the legislative body is conclusive as to classification unless it is based upon so unsubstantial a difference in the

classes affected, or is so arbitrary and unreasonable as to preclude the assumption that the classification was made in the good faith exercise of legislative judgment and discretion. These principles are so well settled that citation of authority is hardly necessary, but among the cases sustaining the principles above enunciated are: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Campbell v. California, 200 U. S. 87; Royster Guano Co. v. Virginia, 253 U. S. 412; Watson v. Comptroller, 254 U. S. 122; Stebbins v. Riley, 268 U. S. 137; Quong Wing v. Kirkendall, 223 U. S. 59; McLean v. Arkansas, 211 U. S. 539; Armour Packing Co. v. Lacy, 200 U. S. 226; Connolly v. Union Sewer Pipe Co., 184 U. S. 540; Alaska Fish Co. v. Smith, 255 U. S. 44.

The decisions are equally clear that in order to sustain classified taxation of things or persons the difference between the classes need not be great. We think it safe to say that slight differences, such as in ability to pay, in character of property or circumstances of persons taxed, will sustain State tax classification against attack under the equal protection clause of the Fourteenth Amendment. Further we think it may be laid down as a sound rule that even though the Court may doubt or question the existence of the distinction or difference forming the basis of classification for State Taxation, yet if the matter is one about which reasonable men may disagree, the judgment and discretion of the legislative body should not be interfered with.

Measured by these rules, we are unable to say that the Act in question violates the equal protection clause of the Fourteenth Amendment. It is well settled, and the plaintiffs concede, that classification for taxation based upon [fol. 157] mere volume is not open to attack under the Fourteenth Amendment. Plaintiffs contend, however, that it is a long cry from classification upon volume, by the application of the same rate to all classes, to a classification which steps up the rate on the respective classes determined according to volume. Conceivably there might be some merit in this contention, if the law under attack here imposed increasing rates upon the entire volume of business done by those in the higher classes. But such is not the case here. All those who fall exclusively within the $400,-

000.00 class have applied to them exactly the same rate, and each taxpayer in each higher classification gets the benefit of exactly the same rate, not only of other taxpayers in his particular classification, but he and all others in his class likewise get the same rate applied to that portion of their sales which falls within the lower classifications as is exacted of those taxpayers who fall exclusively within such lower classifications.

Therefore, it seems quite clear to us that the rates applied in this Act apply equally to all in the same class. Hence, the claim of the plaintiffs that classification of taxpayers according to volume and the application of different rates to different classes amounts to a denial of equal protection of the law, comes at last to the proposition that such classification is so unreasonable and arbitrary as to preclude the assumption that the classification was made in the good faith exercise of the taxing power of the State.

Having in mind the principles heretofore adverted to, we can not agree to this proposition. The Court judicially knows that there is in the public mind a quite widely accepted theory that taxation may properly be based upon ability to pay, and this theory has often been translated into legislative action. There is a widely accepted theory of economics that, as a general proposition, ability to pay increases with volume of business, because generally speak- [fol. 158] ing, increased volume of business means increased profits. We recognize, of course, that this theory of economics is not universally accepted, but, on the contrary, is vigorously opposed by another school of economic thought. These opposing theories were vigorously advanced in these cases by business men and economists in their testimony. If economists and business men disagree on these propositions, how can it be said that legislative classification in harmony with one of these schools of thought to the exclusion of the other is not reasonably founded in the "purposes and policies of taxation", or that such classification precludes the assumption that it was in the good faith exercise of legislative judgment and discretion?

It is vigorously urged upon us that the provision of Section 4 of the Act which allows a credit to the extent of special license, excise, occupational or corporation license

taxes paid by the retail merchant operates to deny equal protection to those taxpayers who are required to pay no such taxes, and as an illegal discrimination in favor of those taxpayers in the lower brackets whose special taxes paid under other laws of the State are sufficient in amount to almost or entirely liquidate the tax here involved. This view is an entirely superficial one. No individual taxpayer under this law has any vested right in the continuation of a corporation license tax imposed by State law on his corporate competitor, nor in the continuation of any other special license tax any of his competitors has heretofore been required to pay. Certainly the Legislature, in the imposition of the tax here involved, could have repealed all special license taxes which were imposed by law upon those coming within the ambit of the Act under consideration. If there are any retail merchants affected by this Act who, prior to its enactment, were not required to pay any special license [fol. 159] taxes, they had the advantage over their competitors from whom such taxes were exacted. Section 4, to the extent that it allows the payment of such taxes as a credit, simply eliminates a discrimination, though not an illegal one, which theretofore existed. The fact that these credits will substantially liquidate the tax of many of the taxpayers whose sales amount to less than $400,000.00 is simply an incident in the operation of the law. Taxpayers in the higher brackets, where they pay such special taxes, get exactly the same credits. Those who complain of these credits because they are not entitled to like credits put themselves in the anomalous position of complaining because they have not heretofore been subject to special license or other special taxes.

It seems to us that the claim of the department stores, that the law in requiring them to treat the operation of all their departments as one unit, and of the chain stores, that the law in requiring them to similarly treat the operation of all of their stores, amounts to a discrimination against them and in favor of the retail merchant operating a single non-department store, is equally wanting in merit. This unitary classification of department stores and chain stores undoubtedly conduces to simplification in the collection of the tax. The taxation is not based upon the number of stores the taxpayer owns, but upon his gross sales. It is in the nature of a license or excise tax, and we know of

no constitutional inhibition which would prohibit the State from requiring each taxpayer to report the result of all of his business in the State and pay taxes on the aggregate result. The seeming inequality urged because of this feature of the law arises from the taxpayer's method of doing business, and not from any inherent inequality in the law itself.

[fol. 160] Does the Act Deny Due Process under the Fourteenth Amendment?

Oftentimes it is difficult to test State legislation, particularly tax legislation, by the due process clause of the Fourteenth Amendment. As pointed out by Mr. Chief Justice Taft in Truax v. Corrigan, 257 U. S. 312, it is more or less customary to treat the due process and the equal protection clauses of the Fourteenth Amendment together; but, as he observed in that case, "while they overlap, and a violation of one may oftentimes involve a violation of the other, the spheres of the protection they offer are not coterminous." It is conceivable that a State taxing statute may be based on a proper classification and give absolute equality between persons in the same class, so as to make it immune from attack under the equal protection clause, and yet amount to a denial of due process.

In considering the question whether a State taxing law denies due process under the Fourteenth Amendment, a consideration of what amounts to a denial of due process of Congress under the Fifth Amendment is most helpful, because it is well settled that the restraint imposed upon State Legislatures by the due process clause of the Fourteenth Amendment is exactly the same as that imposed upon Congress by the due process clause of the Fifth Amendment. Coolidge v. Long, 282 U. S. 582; Heiner v. Donnan, 285 U. S. 312.

In the case of Brushaber v. Union Pacific Co., 240 U. S. page 1, the Supreme Court, in discussing the limitation of the due process clause of the Fifth Amendment on the taxing power of Congress, said:

"So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred

upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same away on the other by the limitations of the due process clause. * * * And no change in the situation here would arise even if it be conceded, as we think it must be, that this [fol. 161] doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

From this language it seems clear that if congressional legislation, under the guise of taxation, amounts to confiscation of property, or is so foreign to the practices of government in taxation as to shock the sense of justice, it would violate the due process clause of the Fifth Amendment, and this principle is re-affirmed in Heiner v. Donnan, supra, and in Nichols v. Coolidge, 274 U. S. 531. This rule, therefore, furnishes a safe guide for determining if State tax legislation transgresses the due process clause of the Fourteenth Amendment.

In thinking of valid taxation, State or National, we instinctively exclude legislation which, either because of the rate imposed or because of other features, amounts to confiscation of the taxpayer's property, whether that property is tangible effects or his business.

Under the Act here involved the effective tax rate, without allowing for deductions of the special taxes referred to in Section 4 of the Act, applicable to taxpayers with gross sales of $1,300,000.00 is in excess of one-half of one per cent; to taxpayers with sales of $5,000,000.00, in excess of 86/100 of one per cent; to taxpayers with $7,000,000.00 of gross sales, 9/10 of one per cent; and to taxpayers with $11,000,000.00 of sales, in excess of 93/100 of one per cent; and as the volume of sales increases beyond this figure, the effective rate gradually approaches, although it can never quite reach, one per cent, due to the fact that the taxpayer [fol. 162] in the higher backets gets the benefit of the ap-

plication of the lower rates to that part of his gross sales which falls within the lower classifications. Therefore, if the proof satisfactorily showed that one per cent of gross sales represents the net profit normally realized by any branch or subdivision of the retail mercantile industry, we would have no hesitation in holding the tax confiscatory—at least as to that branch or subdivision of the industry. The burden is upon the plaintiffs who are attacking the law to show that it is confiscatory; but this burden is not sustained merely by showing that it is confiscatory when applied to the business of the least efficient members of the industry taxed. The test is: What is its effect generally upon the class taxed, or what is the effect generally upon any branch or subdivision of that class? We think the proof falls far short of showing that one per cent of gross sales represents the net profit normally realized by retail merchants as an entire class, or normally realized by any branch or subdivision of the industry. On the contrary, we think the preponderance of the proof is to the effect that the profit is normally from two to two and one-half per cent of gross sales, after deduction of taxes, and that in many lines of retailing the profit is even higher.

Quite a good deal of proof has been introduced which shows that the tax would have been substantially confiscatory as applied to the business of the Kroger Grocery & Baking Company during the three years of 1930, 1931 and 1932; but the proof further strongly tends to show that there was lack of efficiency in the operation of the business of this concern during those years. The testimony of Mr. Morrill, the new President of that concern, shows that under his administration the efficiency of the operations of that company has been so improved that for the first six months of the year 1933 the net profits amounted to [fol. 163] $2,294,000, as compared to substantially $1,475,000 for the entire year 1930; to $2,199,000 for the entire year 1931, and to $2,441,000 for the entire year 1932; and that the net profits, after deduction of taxes for the first six months of 1933 amounted to 2.49 per cent of gross sales, as compared to a net profit of slightly in excess of one-half of one per cent for 1930, slightly less than one per cent for 1931, and slightly in excess of one per cent for 1932. There is nothing in the record to show that the experience of this company on its business in Kentucky is substantially different from that in its business as a whole.

We feel constrained, therefore, to hold that the proof fails to establish that in its application to those in the higher brackets the tax amounts to confiscation. We must confess that it appears to us that the tax falls very heavily on those in the higher brackets; but inasmuch as it falls short of confiscation, relief must be secured at the hands of the Legislature—not from the courts.

Does the Tax Discriminate Against Interstate Commerce, or Constitute a Burden on Interstate Commerce?

We think this question is conclusively decided against the contention of the plaintiffs by the opinion of the Court of Appeals of Kentucky in the case of Moore v. State Board of Charities & Corrections, 239 Ky., 729. The plaintiffs vigorously assail the authority of this case, upon the ground that a legal fraud was practiced upon the State Courts, in that there was no real controversy between the parties to that litigation. We can not escape the fact, however, that the validity of the Act was squarely presented to the Court of Appeals in that case. That court had jurisdiction of the subject matter and of the parties, and while the action which led to the opinion in that case originated after these actions had been filed in this court, that fact can have no [fol. 164] effect upon the binding force of the opinion of the State Court, in so far as it deals with the meaning and interpretation of the Act. The opinion of that court as to the meaning and scope of the Act is binding upon all State officials, and is binding upon us. Truax v. Corrigan, 257 U. S. 312. But of course the opinion of that court as to the practical results of the application of the Act so construed involves a finding of fact and is not binding upon us. That court in the opinion referred to specifically held that the Act does not apply to sales made in interstate commerce, and further held that, properly interpreted, Section 1 does not and was not intended to discriminate against farm and garden products raised in other States and sold in this State.

Does the Act Violate the Bill of Rights of the State Constitution, or Is It Unauthorized by Section 181 of That Instrument?

The tax involved here must find its justification in Sec-

tion 181 of the State Constitution, the pertinent part of which provides:

"The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

This section has been frequently considered by the Court of Appeals of the State, and it is now well settled that it must be read in connection with the Bill of Rights contained in the State Constitution, which forbids the exercise of arbitrary power over the lives, liberty and property of citizens, and secures to all the inalienable right of acquiring and protecting property, and that, when so read, Section 181 confers no power to prohibit, or substantially prohibit by taxation, a legitimate business or to resort to un- [fol. 165] reasonable classification in taxation. Fiscal Court of Owen County v. Cox, 132 Ky. 738; City of Louisville v. Pooley, 136 Ky. 286; Sperry & Hutchinson v. Owensboro, 151 Ky. 389. Thus, we have presented under the Bill of Rights contained in the State Constitution and under Section 181 of that instrument exactly the same questions we have disposed of in our consideration of the due process and equal protection clauses of the Fourteenth Amendment, and it necessarily follows that the claim of the plaintiffs that the Act violates the State Constitution in the particulars referred to must be denied.

The temporary injunction heretofore issued will be dissolved, and the permanent injunction prayed for denied. Inasmuch as we feel confident the plaintiffs will desire to appeal these cases to the Supreme Court, the temporary injunction will be continued in force for thirty days following the entry of the decree herein directed to be prepared, and if before the expiration of that period steps have been taken to appeal the cases, such temporary injunction will be continued until final disposition of the cases by the Supreme Court.

In view of the unsettled economic condition of the country, and in view of the possibility that after a reasonable

trial the law may prove confiscatory as to some branches or subdivisions of the retail mercantile business, we feel constrained to leave these cases on the docket, without prejudice to the right of the plaintiffs, after such reasonable trial, to apply to this Court to reopen and rehear the causes on the single question of confiscation. See: Opinion of the Supreme Court of December 4, 1933, in Glenn et al. v. Field Packing Company.

Counsel may prepare and present for entry a decree conforming to the views herein expressed.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

Judge Cochran dissents.

December 20, 1933.

[fol. 166] Trabue, Doolan, Helm & Helm, Louisville, Ky.; Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio, Attorneys for Plaintiffs.

Bailey P. Wootton, Attorney General, Frankfort, Ky.; S. H. Brown, Assistant Attorney General, Frankfort, Ky.; Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 167] In United States District Court

Dissenting Opinion—Filed May 22, 1934

Cochran, J.:

I feel constrained to dissent from the majority opinion of the court.

Certainly the step up in rate of tax as compared with that in volume of sales may be so great as to be arbitrary and unreasonable. It seems to me that such is the case here. The tax imposed for sales amounting to $400,000.00 is $200, and for those amounting to $1,000,000.00 plus is $10,000.00. The percentage of step up in volume was 250—in ax imposed 5,000 per cent, or twenty times as much.

In the case of City of Newport v. Frankel, 192 Ky. 408, it was held that a city ordinance providing that a moving picture theatre charging an admission fee of fifteen cents

should pay an annual tax of $450 and one charging twenty cents $5,000 was arbitrary and unreasonable. The step up [fol. 168] in volume was 33⅓ per cent and in tax 1,000 per cent or thirty times as much. I am unable to make out that legislation providing a step up in tax twenty times as much as the step up in volume is so much less than that providing thirty times as to remove it from being arbitrary and unreasonable. Difference in business may make this decision inapt.

The classification which the Act makes seems to me arbitrary and unreasonable on another ground. There are four distinct classes of retailers, singly operated units, department stores, chain stores and mail order houses. Their points of difference are many. The chain store has many features and advantages which definitely distinguish it from the singly operated unit. The same is true as to a department store. That such is the case was recognized and held in State Board of Tax Comm'rs vs. Jackson, 283 U. S. 527. It was emphasized in Leggett vs. Lee, 288 U. S. 517. It may be added that a department store has features and advantages definitely distinguishing it from the singly operated unit. The Act ignores this natural and inevitable classification. It classes all retailers of whatever nature together and then reclassifies them according to their volume of sales. Each retailer has to pay the same tax as every other retailer having the same volume of sales. The singly operated unit has to pay the same rate of tax as the chain store or department store having the same volume of sales notwithstanding both have advantages, greater in case of the chain store, which makes for greater profits, over it. Likewise the department store has to pay the same rate as the chain store with the same volume of sales notwithstanding the chain store has advantages, which make for greater profits, over it.

In the Titusville case retailers and wholesalers were treated by the municipality differently in the tax imposed per volume of sales. So here it seems to me that it was arbitrary and unreasonable not to treat singly operated [fol. 169] units, department stores and chain stores differently in the rate of tax imposed per volume. If the rate of tax was to be determined per volume it should have been different as to each class of retailers.

The arbitrary and unreasonable character of the Act

seems to me to be demonstrated by the operation of the Act. The returns for the years 1930, 1931, and 1932 are in the record. Mention will be made only of the returns for 1930, as they are the most complete. 24,163 retail merchants made returns for that year. Their gross sales amounted to $362,848,264 and the tax paid by them to $106,342.94. It is reasonable to assume that these returns cover all retail merchants in the state except plaintiffs and those not plaintiffs but protected by the temporary injunction, twenty-five in number. The gross sales of the plaintiff, Stewart Dry Goods Company, a corporation operating a department store containing seventy-seven departments in Louisville amounted to $3,000,000, the tax upon which is a little over $23,000.00. Those of the plaintiffs, Levy Brothers, a partnership operating a department store in Louisville, amounted to $1,250,000, the tax upon which is almost $5,500.00. The gross sales of the plaintiff, J. C. Penney Co., in this state, a corporation, a chain store operating department stores in and out of this state, twenty-one of which are located in this state, are not before me. The tax thereon seems to be about $10,000.00. And the gross sales in this state of the plaintiff, The Kroger Grocery & Baking Company, a corporation, a chain store operating retail groceries in and out of this state, 263 of which are located in this state, amounted to $14,500,000.00 in round numbers, the tax upon which is approximately $124,000.00. The tax of the Great Atlantic & Pacific Tea Company, one of the twenty-five protected by the injunction, is estimated at approximately $120,000.00 and the taxes of the other merchants so protected is placed at about $50,000.00. This makes the whole tax not over $450,000.00. Of this tax the Kroger Grocery & Baking Company and the [fol. 170] Great Atlantic & Pacific Tea Company pay more than one half though their aggregate gross sales are only 8% of the gross sales in the state. The tax of the Kroger Grocery & Baking Company on $14,500,000.00 gross sales is more than $18,000.00 in excess of that paid by 24,163 merchants on $362,000,000.00 gross sales. The Stewart Dry Goods Company operating a single department store in Louisville pays $23,000.00 taxes on $3,000,000.00 of gross sales, nearly one-fourth as much as the 24,163 merchants making returns upon gross sales amounting to $362,000,000.00, of those 24,163 merchants only 35 of them made

gross sales in excess of $400,000.00. The sum yielded by the tax is a measly sum as compared with the needs of the state and twenty-nine merchants out of over 24,000 pay three-fourths of this sum. In the case of the plaintiff, The Kroger Grocery & Baking Company, its profit in this State was in round numbers $172,000.00. Deducting from this the tax leaves $48,000.00 as net profit, or 1/3 of 1% of the gross sales. The net profit in 1931 would have been less than $40,000.00 and in 1932 there would have been a loss of $9,000.00. The same tax applied to its entire system would turn a profit of $1,400,000.00 into a loss of $700,000.00.

Apparently the sum yielded by the tax is contributed to generally by the retail merchants throughout the state. As a matter of fact, by reason of the credits against the tax, which the act authorizes, and which possibly of itself may render it unconstitutional, more than two-thirds of the retail merchants of the state make no contribution whatever to that sum. The statute is both vindictive and deceptive.

Another particular in which it seems to me that the Act is unconstitutional is that it discriminates against garden and farm products raised in other states, in that it excepts from its provision retail merchants selling garden and farm products raised by them in this state. A retail merchant who sells such products raised elsewhere is subject to the tax. The plaintiff, The Kroger Grocery & Baking Com-
[fol. 171] pany, comes within that category. It operates a farm of 360 acres in Ohio named "Country Club Farm" after the "Country Club" brand, one of its best known brands. On that farm it produces cattle, sheep, hogs, poultry, milk and garden and other farm products which are sold at retail in this state. The language of the exception is "those actually engaged in gardening or farming and selling garden or farm products raised by them in this state". The Court of Appeals of Kentucky in the case of Moore vs. State Board, 239 Ky. 729, construed this exception as follows:

"However, we are of the opinion that the phrase 'in this State' was meant to modify the word 'selling' and not 'raised'. The whole import of the Act is the levy of a tax measured by sales made in this state. It is the sales which count, not the place where the goods sold are produced. It was plainly the purpose of the act to exempt from its operation those engaged in gardening and farm-

ing and selling their own products, such sales the Legislature intended to be without the operation of the act and it was of no moment to that body where the produce sold was raised."

The construction placed on the exception is as if it read "those actually engaged in gardening and farming and selling in this state garden or farm products raised by them." It seems to me that construing it to mean as if it so read is taking unauthorized liberty with the language of the Act. There is one consideration, however, which makes it certain that the legislation had no such meaning. To so read the statute exempts the plaintiff, The Kroger Grocery & Baking Company, from the act. The exemption is not of persons, but of retail merchants so engaged in selling and that plaintiff is such a merchant. It is inconceivable that the legislature intended to make such an exemption. Then, if it be taken that it did, this circumstance of itself would seem to affect the validity of the act. It will hardly do to hold that the plaintiff, The Kroger Grocery & Baking Company, shall not pay the tax and The Great Atlantic & Pacific Tea Company shall. This [fol. 172] is a case, as I see it, where this court is not bound to follow the state court in its construction of the Act. It is governed by the statement on this subject in the case of Edward Hines Trustees v. Martin, 268 U. S. 458, 463.

On the other question involved I think that the plaintiffs have a plain and adequate remedy at law in this court. Where this state levies a tax which the taxpayer claims is illegal and pays under protest, it is exacted from him by duress and the official into whose hands it comes and the state itself hold it in trust to repay to the taxpayer if it is held by the court to have been illegal. It cannot and should not be used for the purpose for which it was levied and collected, at least, until the lapse of a resonable time for the taxpayer to assert his right. Nothing else appearing it is to be taken that this trust will be respected. In this state it has been the invariable practice to so treat taxes so paid and upon its being held that the tax is illegal to repay it at once. This is unaffected by the present wretched financial condition of the state. If the tax paid has not been kept intact so as to enable such repayment to be made there is always enough cash in the general fund sufficient

for that purpose. Sections 4688-1 to 4688a-2 and 4689, Kentucky Statutes, do not relate to warrants drawn by the Auditor on the Treasurer to repay illlegal taxes which have been collected. They relate solely to warrants so drawn in favor of voluntary creditors of the state. Hence they have no bearing here. Section 162, Kentucky Statutes, relates to warrants drawn to pay such taxes. A decision of the Kentucky Court of Appeals is not needed to make good any of these propositions. Their correctness is apparent. A recognition of the invariable practice of the state officials to respect the trust imposed by payment under protest of taxes claimed to be illegal and an indication that the Appellate Court of the state will enforce such trust is to be found in the case of Talbott, Auditor, vs. Childers, Execu- [fol. 173] tor, 247 Ky. 568. It involved the question as to whether a succession tax paid by an executor in order to procure the right to transfer corporate stock could be recovered when it had not been made under protest. The court, in demonstrating the need for such a protest made at the time the tax was paid, said:

"So that the Collector thereof may become forewarned that an effort would be later made to recover the amount, either in whole or in part, and so that the distributors of such tax to said agencies entitled to it might become advised that payments so made are not permanent but only tentative, subject to be refunded by whatever proceeding payor might thereafter take."

See also case of Talbott vs. Urquhart's Exors., 250 Ky. 143.

Section 10 of the act here involved expressly authorized the taxpayer to bring an action to recover the tax which he has paid under protest. This authority is unlimited and amounts to a consent on the part of the state that it may be sued in this court. If judgment is rendered in its favor this court has jurisdiction by mandamus to compel repayment of the tax. If limited to the general fund therefor, there is always sufficient in that fund out of which it can be paid. But it is not to be expected that it will be so limited. It should be taken that the tax paid, if paid under protest, will be kept intact so that it can be repaid upon such adjudication. There is nothing in the act against this.

[fol. 174] IN UNITED STATES DISTRICT COURT

MOTION FOR FINDINGS AND CONCLUSIONS—Filed December 26, 1933

The plaintiff in each of the above-styled cases, by counsel, moves the Court, before entry of a decree herein, to find the facts specially upon which its decree is based and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions, all as provided by Equity Rule 70½ as expounded by the Supreme Court in Pub. Serv. Com. v. Wisconsin Tel. Co., 289 U. S. 67, at page 69; Tax Comm'rs. v. Jackson, 283 U. S. 527, at page 533.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Attorneys for Plaintiffs.

Have seen. 12/26/33. H. W. Batson.

[fol. 175] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed May 21, 1934

Findings of Fact

The court, pursuant to Equity Rule 70½, makes the following findings of fact:

State Warrants

1. The state of the General Fund of Kentucky on the dates set out hereunder is indicated by the figures which appear after the respective dates.

[fol. 176]

Date	Balance to credit of general fund	Outstanding warrants against general fund
6/30/1922	$297,967.85	$4,702,709.11
6/30/1923	2,590,470.14	5,947,750.40
6/30/1924	167,535.74	4,089,151.37
6/30/1925	310,242.68	4,127,746.17
6/30/1926	10,387.44	4,329,772.33
6/30/1927	257,566.83*	4,664,820.89
6/30/1928	440,328.14	6,715,347.99
6/30/1929	1,880,084.77	8,060,920.69
6/30/1930	1,826,244.05	8,533,394.79
12/31/1930	1,250,168.22	9,880,501.76
6/30/1931	2,440,128.46	11,023,911.53
12/31/1931	838,269.63	12,637,990.48
6/30/1932	1,302,267.69	13,851,414.57
12/31/1932	573,831.32	14,415,403.69
5/25/1933	1,898,229.25	14,668,744.57
7/30/1933	.....	15,197,005.42

*Deficit.

2. Claims against the Commonwealth of Kentucky, whether for refund of taxes or on account of other obligations of the State, are first audited by the Auditor of Public Accounts, and, if found correct, he issues a State warrant for the amount thereof, which is, in effect, an order on the Treasurer for the amount of the claim. These warrants are made payable out of different funds, some out of the General Fund, and others out of other funds set aside by legislative act for specific State purposes. If the Treasurer has on hand in the fund against which the warrant is drawn sufficient funds to pay same at the time it is presented, it is usually paid; otherwise it is stamped interest bearing, and after warrants have been stamped interest bearing, they are called and paid in the order in which they are issued. Due to lack of funds, however, to the credit of the General Fund, no interest bearing warrants against that fund issued since 1927 have been paid.

3. Outstanding interest bearing warrants against the General Fund of the State, during all the time since the passage of the Act in question in these cases, have sold below par, the price at times being as low as eighty-three cents on the dollar.

4. It has been the practice of the State Treasurer in recent years to pay in cash, upon presentation, warrants issued for refund of taxes, and such has been the uniform practice of the Treasurer who has been in office at all [fol. 177] times since the passage of the Act in question, and he has at all times since he has been in office followed the practice of keeping himself in financial position to refund all taxes paid under legal protest when required so to do, and he at all times has been in a position so to do with reference to the taxes involved in these actions. There is no statute in Kentucky, however, specifically authorizing such preferential treatment of tax refund warrants, nor has the Court of Appeals of the State ever held that such practice is authorized by the laws of the State.

5. Unless warrants drawn under Section 10 of the Act were given preferential treatment in payment, they could not be collected within a reasonable time.

Conclusions of Law Based Upon the Above Findings of Fact

Inasmuch as there is doubt of the authority of the Treasurer of the State to give preference in payment to warrants issued under Section 10 of the Act, that section fails to afford to the plaintiffs as certain, speedy, complete and efficient a remedy at law as is available to them in equity, and therefore these actions are cognizable in equity.

Facts Relative to Fourteenth Amendment

1. The challenged Act is essentially a revenue measure.

2. The tax imposed by the Act, exclusive of the credits allowed, is as follows:

Sales of first four..	$100,000	rate of	1/20 of 1%,	or a tax of	$200.00
Fifth	$100,000 of sales	" "	2/20 of 1%,	or a tax of	100.00
Sixth	$100,000 of sales	" "	5/20 of 1%,	or a tax of	250.00
Seventh	$100,000 of sales	" "	8/20 of 1%,	or a tax of	400.00
Eighth	$100,000 of sales	" "	11/20 of 1%,	or a tax of	550.00
Ninth	$100,000 of sales	" "	14/20 of 1%,	or a tax of	700.00
Tenth	$100,000 of sales	" "	17/20 of 1%,	or a tax of	850.00
Eleventh	$100,000 of sales	" "	1%,	or a tax of	1,000.00
On each	$100,000 of sales hereafter,		1%.		

[fol. 178] 3. Examples of the special license taxes and corporation taxes allowed as credits under Section 4 of the Act are: the corporation license tax of seventy cents on each one thousand dollars of business transacted by the corporation in the State, or on the value of the capital stock of the corporation; cigarette license tax of $10; soft drink license $2.50; oleomargarine license $3.; playing cards $10.00; pistols $10; bowie knives, dirks, etc. $100, etc.

4. There are approximately 25,000 retail stores in the State of Kentucky.

5. No merchant in Kentucky has an annual sales volume in excess of fifteen million dollars. Without giving effect to the credits authorized by Section 4 of the Act, there is shown below the amount of taxes which are payable by merchants falling in the respective brackets fixed by the Act, and also the effective rate of such tax expressed in percentage of gross sales.

Amount of sales	Total tax payable	Effective rate
$400,000	$200	.05
500,000	300	.06
600,000	550	.0917
700,000	950	.1357
800,000	1,500	.1875
900,000	2,200	.2444
1,000,000	3,050	.305
2,000,000	13,050	.6525
3,000,000	23,050	.7683
4,000,000	33,050	.8263
5,000,000	43,050	.861
10,000,000	93,050	.9305
15,000,000	143,050	.96

6. For the year 1930, 24,163 returns were filed by merchants subject to the Act, and these returns showed an aggregate of gross sales of $362,848,264. 24,128 of these reporting merchants showed gross sales of less than $400,000 each, and the aggregate gross sales of these 24,128 was $340,197,497. 16,413 of the merchants falling in this group, by reason of credits allowed by Section 4, paid no tax. The total tax levied against this group, after the allowance of credits, amounted to $89,220.76 for the year 1930.

[fol. 179] 7. The following is a correct analysis of the report filed by the 24,163 merchants above referred to for the year 1930, showing the number of returns in the various brackets, their gross sales in the same groups, and the net tax after deduction of credits allowed by Section 4, except that there is not shown the effect of the operation of the challenged Act upon the business of those merchants (25 in number), who made no report, having availed themselves of the opportunity afforded by the court to post bond in order to secure the protection of the injunction issued in these cases.

	Number of returns	Gross sales	Net tax
Sales less than $400,000	24,128	$340,197,497	$89,220.76
Sales between $400,000 and $500,000	13	5,866,935	1,261.37
Sales between $500,000 and $600,000	8	4,416,568	1,317.40
Sales between $600,000 and $700,000	5	3,234,563	1,768.56
Sales between $700,000 and $800,000	4	2,989,019	1,383.09
Sales between $800,000 and $900,000	1	814,559	0
Sales between $900,000 and $1,000,000	0	0	0
Sales in excess of $1,000,000	4	5,329,123	11,391.76
Totals	24,163	$362,848,264	$106,342.94

8. The following is a correct analysis of the returns, gross sales and net tax, after the allowance of credits under Section 4, for the year 1931, excluding the operation of

the Act on the business of those merchants who have posted bond, made no report and paid no tax.

[fol. 180]

	Number of returns	Gross sales	Net tax
Sales less than $400,000	20,351	$290,824,180	$66,769.82
Sales between $400,000 and $500,000	10	4,520,653	1,007.59
Sales between $500,000 and $600,000	9	4,887,385	1,360.02
Sales between $600,000 and $700,000	3	1,927,791	1,461.17
Sales between $700,000 and $800,000	2	1,472,166	905.08
Sales between $800,000 and $900,000	3	2,549,814	3,118.74
Sales between $900,000 and $1,000,000	2	1,895,680	4,128.35
Sales in excess of $1,000,000	2	2,389,404	6,386.22
Totals	20,382	$310,467,073	$85,136.99

9. Similarly, the following is a correct analysis of the returns of the same class of merchants for the year 1932, which had been filed up to and including April 17, 1933:

	Number of returns	Gross sales	Net tax
Sales less than $400,000	14,582	$178,783,514.26	$35,948.38
Sales between $400,000 and $500,000	4	1,835,261.79	282.28
Sales between $500,000 and $600,000	5	2,764,557.15	1,107.50
Sales between $600,000 and $700,000	1	601,558.29	0
Sales between $700,000 and $800,000	2	1,522,598.66	1,297.06
Sales between $800,000 and $900,000	1	864,205.61	1,534.44
Sales between $900,000 and $1,000,000	1	939,417.13	0
Sales in excess of $1,000,000	2	1,001,903.32	2,747.03
Totals	14,597	$186,313,016.81	$42,916.69

[fol. 181] 10. The evidence fails to show that there is no relation between sales volume and net earnings, nor does it satisfactorily rebut a widely accepted theory of economists that, as a general proposition, increased volume of sales results in increased profits and increased ability to pay. On the contrary, there is substantial evidence supporting the affirmative of each of these propositions.

11. The rate of profit realized from sales at retail generally varies with the character of goods sold.

12. Under the Act goods sold on credit are included in gross sales, whether payment therefor is made or not.

13. The management of a store or stores is one of the fundamental factors in determining whether or not a profit is realized, and the amount of profit.

14. As a general proposition, those merchants doing the largest volume of trade are enabled to secure the highest type of management.

15. In the field of retail merchandising large scale enterprises, properly and prudently managed, enjoy economies in operation, such as the ability to purchase in large quantities and wider spread of overhead, not generally enjoyed by those stores doing a small volume of business. Yet in exceptional instances some retail merchants enjoy a high rate of profit on a small volume of sales, while in other cases the margin of profit is very low, even though the sales volume be very large.

16. Sales made by merchants taxed under any of the brackets of the Act are in competition with sales made by merchants selling the same character of goods who are taxed under other brackets of the Act.

17. The Kroger Grocery & Baking Company operated 5302 stores in the United States in 1930; 4980 stores in 1931, and 4816 stores in 1932. Of this number 289 were [fol. 182] located in Kentucky in 1930; 254 in 1931, and 249 in 1932. The average annual sales per store of the Kroger Grocery & Baking Company in Kentucky over the past few years has been approximately $50,000. Most, if not all, of the stores of this company are in competition with other grocery stores located in the neighborhood, and the sales of some of these competing stores exceed the sales of the Kroger Stores with which they compete. Some of these competitors of the Kroger stores are owned by merchants operating single stores with a relatively small volume of sales, and in some instances are entitled to enough credits under Section 4 of the Act to wipe out the tax liability under the Act, whereas the competing Kroger stores, by reason of the fact that the Kroger tax liability is determined upon the aggregate sales of all of its stores, pay an average annual tax of between $425.00 and $450.00,

18. The retail sales of Kroger in the United States for the years, 1930, 1931 and 1932 have been as follows:

1930	$267,094,345.26
1931	244,371,147.17
1932	213,159,742.69

and the Kentucky sales for this same three year period have been:

1930	$14,653,448
1931	13,496,915
1932	11,447,611

19. The gross sales of the Stewart Dry Goods Company are approximately $3,000,000 per year. Without taking account of the credits to which it is entitled under Section 4 of the Act, its annual tax under the Act is approximately $23,000, which would figure approximately 76/100 of one per cent of gross sales. This company operates seventy departments, each bearing its proportionate part of the expense of the whole establishment. No department has annual sales in excess of $400,000, and in a considerable number of instances the total sales of a particular department of Stewarts are approximately the same as the sales of specialized stores selling the same line of goods, and [fol. 183] in some cases the sales of particular departments do not equal the sales of specialized stores in competition with that particular department. Department stores such as Stewart's do not enjoy any particular advantage over their specialty store competitors in purchasing, but do have over their specialized competitors some advantage, due to the fact that customers who come to purchase one article are attracted to articles and make purchases in other departments.

20. Levy Brothers are individuals, who operate as partners a department store in Louisville, Kentucky with annual gross sales of approximately $1,250,000, on which they are required to pay a tax under the Act of approximately $5,500. Departments in this store compete with one or two chain store organizations which have only one store in the State of Kentucky. They also compete with individual specialized stores, which in some instances, because of the comparatively small volume of business done and credits allowed, pay little or no tax.

21. Byck Brothers operate a department store in Louisville, Kentucky, with annual gross sales of approximately $700,000. They also operate a department by lease in the Wolf-Wile Department Store at Lexington, Kentucky. This department in Lexington is in no way affected by the sale of goods in Louisville, but does compete directly with stores handling similar merchandise in Lexington, and its annual volume of sales is approximately $50,000. Under

the Act, including the sales of this department, the tax of Byck Brothers is approximately .14/100 of one per cent of its gross sales. In a general way, this concern has the same problem of competition with single specialized stores as have Stewart Dry Goods Company and Levy Brothers, with relatively the same advantages.

Conclusions of Law on the Foregoing Findings of Fact

By reason of the foregoing findings of fact, we conclude that the Act does not deny the plaintiffs the equal protec- [fol. 184] tion of the law, within the meaning of the Fourteenth Amendment, in any of the particulars asserted by the plaintiffs.

Findings of Fact with Reference to Interstate Commerce

1. A considerable volume of the trade of the Stewart Dry Goods Company consists of sales made to customers in other States who buy merchandise by telephone, mail or personally from Stewarts, to be delivered at their place of residence in such other State. The record, however, fairly justifies the conclusion that such sales are actually consummated in Kentucky.

2. The Kroger Grocery & Baking Company ships packaged articles from outside the State of Kentucky to its stores in that State, where such articles are sold in the original containers in which they are packed for shipment. The retail sales of such articles, however, are separate and distinct transactions had after the goods have come to rest and become a part of the stock of merchandise of the particular store making the sale, such retail sales being entirely consummated in Kentucky.

3. The Kroger Grocery & Baking Company operates a farm in Ohio, where it raises farm and garden products, a portion of which is placed in some of its stores in Kentucky and sold by retail from such stores. The amount of such farm and garden products, however, is relatively small as compared to the total of such products handled by such stores.

Findings of Fact Relative to the Decision of Moore vs. State Board of Charities & Corrections, 239 Ky. 729

1. The case of Moore v. State Board of Charities & Cor-

rections, supra, was filed on the 22nd day of December, 1930, which was prior to the filing of any of these actions.

2. The D. T. Bohon Company, cross-petitioner in the Forrest Moore case, represented to the State courts of Kentucky in that action that it was a taxpayer under the [fol. 185] act, and the case was decided on the theory that such a statement was true, but the Bohon cross-petition was filed in the Moore case after the institution of these actions and after their submission on plaintiffs' motions for temporary injunctions.

Conclusions of Law Upon the Above Facts

1. The decision in the Moore case by the State court, as to the meaning and scope of the Act in question, is binding upon this court.

2. As the Act has been interpreted and construed by the Court of Appeals of Kentucky in the Moore case, it does not violate the commerce clause of the Federal Constitution in any of the particulars urged by the plaintiffs.

Facts Relative to Claim of Confiscation

1. The evidence fails to show that the tax imposed is generally so burdensome upon those taxed as to deprive them of an opportunity to make a reasonable profit in their business.

2. The Kroger Grocery & Baking Company, for the year 1930, realized a net profit of 55/100 per cent on its entire gross sales; 9/10 per cent for 1931, and 1.15 per cent for 1932. These figures, however, are not typical of the experience of the class taxed, nor of any subdivision of such class; nor do they present a fair picture of the operation of that company under reasonably efficient management. For the first six months of 1933, under the management of Mr. Morrill, who became President of the company in 1930, the net profit of the company was $2,294,000, as compared to approximately $1,475,600 for the entire calendar year 1930; $2,199,000 for the entire year 1931, and $2,441,000 for the entire year 1932; and the net profit for the first six months of 1933, after deduction of taxes, amounted to 2.49 per cent of gross sales.

[fol. 186] Conclusion of Law Based on the Foregoing Facts

Under the facts found, the tax imposed by the Act is not confiscatory, and therefore does not violate the due process clause of the Fourteenth Amendment, nor does it violate Section 181 of the Constitution of Kentucky or the Bill of Rights of that instrument.

These specific findings of fact are not to be construed as in derogation of any of our conclusions of fact set out in the opinion and not herein enumerated.

Xen. Hicks, U. S. Circuit Judge. Chas. I. Dawson, U. S. District Judge.

——, 1934.

[fol. 187] In United States District Court

Equity No. 611

Order and Decree—Entered June 19, 1934

This cause, having been heard on the merits, was submitted on August 21, 1933, upon the stipulations, proof and record set out in the order of submission entered as of that date, and the Court thereafter, to wit, on December 20, 1933, filed its opinion herein, concurred in by a majority of the Judges, Judge Cochran dissenting therefrom as set out in his dissenting opinion filed May 22, 1934, and now made part of the record herein.

Complainant, on December 26, 1933, moved the Court, before entry of any decree herein, to find the facts specially, upon which its decree is based, and to state separately its conclusions of law thereon, and to enter of record such findings and conclusions.

Thereafter, complainant, on March 24, 1934, and defendants on the — day of ——, 1934, by their respective counsel, tendered findings of fact and conclusions of law proposed by them respectively, and moved the Court to adopt same as set forth in their respective motions entered of record.

The Court, having considered this cause in chief and upon the respective motions made by the complainant and by the defendants as to findings of fact and conclusions of law proposed by them respectively, and being now advised, orders and decrees herein as follows:

I

[fol. 188] (1) Complainants' motion entered herein December 26, 1933, for findings of fact and conclusions of law, is hereby sustained, and the Court, in compliance therewith, now files herein its findings of fact and its conclusions of law and orders same to be entered of record, such findings of fact and conclusions of law being concurred in by a majority of the Court and dissented from in part by the Honorable Andrew M. J. Cochran.

(2) Except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of complainant entered herein March 24, 1934, to adopt and enter the findings of fact and conclusions of law tendered with complainant's said motion of that date, is hereby overruled; to which the complainant excepts.

(3 In like manner, except to the extent set forth or indicated in the findings of fact and conclusions of law this day filed herein by the Court as a compliance with Equity Rule 70½, the motion of defendants entered herein —— —, 1934, to adopt and enter the findings of fact and conclusions of law tendered with defendants' said motion of that date, is hereby overruled: to which the defendants jointly and severally except.

II

Pursuant to its opinion filed herein December 20, 1933, and its findings of fact and conclusions of law filed herein on the 21st day of May, 1934, the Court now adjudges and decrees:

(1) That the complainant is without an adequate remedy at law, and therefore the motion of defendants to dismiss the complaint as amended, for want of jurisdiction in equity, is denied; to which ruling the defendants except.

(2) That complainant take nothing by its bill of complaint as amended herein; that on final hearing upon the [fol. 189] merits same is dismissed; and that defendants recover of complainant their costs herein expended; to all of which the complainant excepts.

(3) That complainant having this day stated in Court its intention to appeal from this decree insofar as it denies

the relief sought by it and dismisses its bill of complaint as amended, it is, for the reasons set forth in the Court's opinion filed herein December 20, 1933, hereby ordered and adjudged that the interlocutory injunction heretofore granted in this cause shall be continued in effect as to the complainant and as to each retail merchant listed of record (by order entered herein March 30, 1931, and supplemented, as to other intervening taxpayers, by later orders) as included in the same class of taxpayers as complainant, and such interlocutory injunction shall remain in full force as to the complainant and each of said taxpayers so listed, until the final determination of complainant's said appeal; to all of which the defendants except.

Provided, however, that the complainant, for itself only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), in addition to the bonds heretofore given by them respectively, with the approval of the District Judge for this District, shall within thirty (30) days from the entry of this decree execute such bond or make such deposit of money or securities as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, or any other proper charges that may be or may become due from such taxpayer for the calendar year 1933 under the Act assailed herein by complainant, in the event the validity of such Act should be finally established.

The amount of any such additional bond so given, or the amount or value of securities or money deposited by any taxpayer, shall be fixed at an amount equal to the estimated [fol. 190] taxes claimed from such taxpayer for the calendar year 1933.

The parties to this action, through their respective counsel, may by agreement between them determine the amount of any such additional bond to be executed by any taxpayer, and the surety thereon, or the nature, kind and amount of money or securities to be deposited in lieu of bond, and if the parties, through their counsel, can not agree thereon, same shall be fixed by the District Judge of the District in which this cause is pending.

In the event the complainant or any one of said taxpayers shall fail to execute such bond or to give such security as

is required of it or him or them to cover taxes accrued for the calendar year 1933, within thirty (30) days from the entry of this order and decree, said restraining order, as to such taxpayer so failing, shall be thereupon immediately dissolved as to taxes accrued for the calendar year 1933, and shall afford no further protection of such taxpayer as to such taxes for the calendar year 1933, but the taxpayer shall be entitled to the benefit of the injunction as to prior years for which it has executed a bond or made deposit of money or securities under orders heretofore entered in this cause.

The bonds heretofore executed by the complainant or by any taxpayer herein for any of the taxable years prior to the calendar year 1933 shall be continued in full force and effect pending the final determination of this cause on appeal, and in like manner all deposits of securities heretofore made shall be continued in pledge for the purposes for which such deposits respectively were made.

Xen. Hicks, Circuit Judge. Chas. I. Dawson, District Judge.

June 19, 1934.

Have seen: Trabue, Doolan, Helm & Helm, of Counsel for Plaintiff. S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, for Defendants.

[fol. 191] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—Entered July 17, 1934.

This 17th day of July, 1934, came the parties in the above styled cause, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed in compliance with the order and decree of this Court entered herein June 19, 1934, conditioned as therein provided to secure the Commonwealth of Kentucky on account of its claim for taxes for the year 1933, together with interest, court costs and all other proper charges that may accrue thereunder.

J. C. Penney Company, in the amount of $13,000.00.
Kaufman-Straus Company, in the amount of $8,000.00.

Levy Bros. in the amount of $2,600.00.
H. P. Selman & Company, in the amount of $1,500.00.
Hook Drug Company, Inc., in the amount of $240.40.
Byck Bros. & Company, Inc., in the amount of $153.35.
J. Bacon & Sons, in the amount of $4,002.33.
Montgomery Ward & Co., Incorporated, in the amount of $2,000.00.
The Stewart Dry Goods Co., in the amount of $20,000.00.
Ben Snyder, Incorporated, in the amount of $5,960.00.
Lerman Brothers, in the amount of $3,600.00.

Chas. I. Dawson, Judge.

Have seen: S. H. Brown, Assistant Attorney General.

July 17, 1934.

[fol. 192]. In United States District Court

Petition for Appeal—Filed September 12, 1934

The plaintiff, J. C. Penney Company, conceiving itself aggrieved by the order and decree entered herein by this Court on the 19th day of June, 1934, in the above entitled cause, insofar as said order and decree denies the motion of this plaintiff, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed for in the motion of the plaintiff for such interlocutory injunction, and insofar as said order and decree dismisses the Bill of Complaint as amended, and denies to the plaintiff a permanent injunction or any injunctive or other relief, hereby appeals to the Supreme Court of the United States from said order and decree.

The appeal herein prayed for is taken upon the grounds and for the reasons specified in the assignment of errors filed herewith.

Plaintiff prays that said appeal be allowed and that [fol. 193] a citation be issued thereon directed to the above named defendants, John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before its Supreme Court

of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered be duly authenticated and sent to the Supreme Court of the United States.

—— ——, —— ——, Solicitors for Plaintiff.

[fol. 194] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed September 12, 1934.

The plaintiff, by counsel, respectfully represents that in the record and proceedings had in the above-entitled cause and in the rendition of the decree herein appealed from there is manifest error, for which said decree should be reversed, and as cause for such reversal the plaintiff makes the following assignments of error:

1. The Court erred in failing to hold that the challenged Act designedly denies to plaintiff and to other retail merchants similarly situated the equal protection of the laws, in that by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiff and other retail merchants having [fol. 195] a large volume of annual gross retail sales and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiff and other retail merchants in like situation, at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and therefore taxed at greatly reduced rates, or not taxed at all, by reason of credits or deductions allowed them—all in disregard of capital invested by the taxpayer, or of his ability to pay, or of his earnings, income or profits accruing from his business of retail merchant, and likewise in disregard of the fundamental factor of management.

2. The Court erred in failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject matter of the Act, and therefore effects an unjust and unreasonable discrimination against this plaintiff in the matter of taxation upon its gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales or greater exemptions, and thus denies to plaintiff the equal protection of the laws guaranteed to it by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in holding that the enactment of the challenged Act might be sustained upon a mere academic [fol. 196] theory of economists in classifying property for taxation, when the facts shown in the record and the actual results in operation of the law demonstrate (a) that such theory is fallacious and (b) that there is no reasonable relationship between the assumed theory and the varying rates of taxation prescribed for the several classifications made under the challenged Act.

4. The Court erred in failing to hold that there was no reasonable relationship between the "step up" or increase in rates of taxation levied by the challenged Act, on the one hand, and the claim tendency of profits to increase with increased sales, regardless of capital investment, management, or other factors, on the other hand.

5. The Court erred in finding that there is a taxable relationship between sales volume and net earnings.

6. The Court erred in failing to hold that the classification of all retail merchants in one general class, including therein Chain Stores, Department Stores, Mail Order Houses and singly-operated units, of whatever character, with subclassifications thereof and varying rates of taxation thereon, based on volume of sales alone, was arbitrary, unreasonable, vindictive and capricious.

7. The Court erred in failing to hold that the increases in rates imposed and taxes levied by the challenged Act in its higher brackets for taxation were out of all propor-

tion to any actual or claimed increases in percentages of net profits to sales in such brackets respectively, and varied so greatly as to be arbitrary and unreasonable.

8. The Court erred in failing to hold, upon the evidence adduced, that the challenged Act, in its actual operation [fol. 197] and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, retail merchants who compete with plaintiff in the same or similar lines of business but who have a smaller volume of gross sales than plaintiff, while at the same time levying upon plaintiff, with its larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

9. The Court erred in failing to hold that the challenged Act denies to the plaintiff the equal protection of the law in that it unjustly and unreasonably discriminates against the plaintiff by reason of the facts found by the Court (except the mere computation of plaintiff's taxes under the Act) as follows: that plaintiff, for the taxable years of 1930, 1931 and 1932 had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Sales	Taxes	Deduction
1930	$1,854,174.23	$11,591.74	$1,499.54
1931	2,169,523.59	14,745.24	462.65
1932	1,924,550.86	12,295.51	512.15

whereas for said years respectively a vast number of other retail merchants, many of whom actually and actively compete with plaintiff, had gross sales in Kentucky with resulting taxes under the challenged Act as follows:

	Number of merchants	Sales	Net tax less deductions
1930	24,163	$362,848,264.00	$106,342.94
1931	20,382	310,467,073.00	85,136.99
1932	14,597	186,313,016.81	42,916.69

10. The Court erred in holding that the decision of Moore v. State Board of Charities and Corrections, re- [fol. 198] ported in 229 Ky. 729, was binding upon the Court as to the construction of the challenged Act and in

then refusing to adopt the construction attributed by that decision to the challenged Act.

11. The Court erred in failing to hold that the challenged Act, according to the construction approved by the Court, denies to the plaintiff and others similarly situated the equal protection of the law in that, as so construed, it exempts from its operation merchants selling farm products raised by them and therefore exempts The Kroger Grocery & Baking Company, together with other taxpayers, but applies to plaintiff and others doing a similar business.

Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignment of errors, plaintiff prays that the decree herein appealed from be reversed with directions to the District Court to set aside said decree and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiff's Bill of Complaint.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.

[fol. 199] IN UNITED STATES DISTRICT COURT

In Equity. No. 611

ORDER ALLOWING APPEAL—Entered September 12, 1934

This day came the parties, plaintiffs and defendants, by their counsel, and plaintiff filed herein its petition for appeal to the Supreme Court of the United States from the final decree herein rendered by this court on June 19, 1934, and filed also its assignment of errors in support of said petition.

Therefore, it is ordered by the court

1. That the appeal to the Supreme Court of the United States prayed for by the plaintiff, as set forth in its petition for appeal, be and it hereby is allowed as prayed for in said petition.

2. That a transcript of such parts of the record and proceedings herein as the parties may by praecipe duly desig-

nate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued admonishing the defendants and each of them to be and appear in the Supreme Court [fol. 200] of the United States within thirty days from this date as provided by law.

4. That an appeal bond for costs and damages upon said appeal in the penal sum of $1,000 shall be given by the plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this court entered June 19, 1934, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the tax years 1930 to 1933, inclusive, it is now ordered that said appeal bond for costs and damages required herein shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the surety thereon herein required shall be approved by the District Judge presiding in the Western District of Kentucky.

Xen. Hicks, United States Circuit Judge. Chas I. Dawson, United States District Judge.

Sept. 12, 1934.

[fols. 201 & 202] Bond on Appeal for $1,000 approved and filed Sept. 12, 1934, omitted in printing.

[fols. 203 & 204] Citation in usual form showing service on Bailey P. Wooton and S. H. Brown issued Sept. 12, 1934, omitted in printing.

[fol. 205] IN UNITED STATES DISTRICT COURT

In Equity. No. 611

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed September 20, 1934

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States

shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified:"

1. The record from this Court as printed for use of the Supreme Court on the former appeal of this case.
2. Mandate from Supreme Court with order filing same.
3. Order entered December 10, 1932.
4. Order amending interlocutory injunction.
5. Amended Bill.
6. Answer to Amended Bill.
7. Second Amended Answer.
8. Stipulation as to evidence on final hearing.
9. Order substituting Emerson Beauchamp as a party defendant.
10. Order of submission.

[fol. 206] 11. Stipulation as to statement of evidence.

12. Opinion of Judge Hicks and Judge Dawson.
13. Dissenting opinion of Judge Cochran.
14. Motion to find facts.
15. Findings of fact and conclusions of law.
16. Decree.
17. Order approving bonds.
18. Petition for appeal.
19. Assignment of errors.
20. Order allowing appeal.
21. Appeal bond.
22. Citation and endorsement of accepted service.
23. This Stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Plaintiff.
B. P. Wooton, Attorney General; S. H. Brown, Asst. Atty. Gen., Solicitors for Defendants.

[fols. 207-209] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 210] SUPREME COURT OF THE UNITED STATES

Statement of Points to be Relied Upon and Designation as to Printing Record—Filed Oct. 9, 1934

STATEMENT OF POINTS

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are that the United States District Court for the Western District of Kentucky erred in the rendition of its final decree and in dismissing appellant's bill of complaint, in the following particulars:

Point 1. In failing to hold that the Challenged Act, Chapter 149 Session Acts of 1930, designedly discriminates against and denies to appellant and to other retail merchants similarly situated the equal protection of the laws, for the reason that the Challenged Act imposes upon the appellant and other retail merchants similarly situated a grossly excessive and disproportionate tax burden and at the same time wholly or partially exempts from the burdens of said Challenged Act the vast majority of other retail merchants competing with appellant and engaged in the same business, and for the further reasons specifically set forth in appellant's assignment of errors numbered 1, 2 and 9.

[fol. 211] Point 2. In failing to hold that the Challenged Act is, by reason of its classifications, exemptions, credits, disproportionate and widely varying rates of taxation, arbitrary, unreasonable, vindictive and capricious, as specifically set forth in assignment of errors numbered 3, 4, 5, 6, 7 and 8.

Point 3. In failing to hold that the Challenged Act denies to appellant and other retail merchants similarly situated the equal protection of the laws for the reason that said Act as construed by said Court exempts from its operation merchants selling farm products raised by them but applies to appellant and others similarly situated as specifically set forth in assignment of errors numbered 11.

The J. C. Penney Company, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above list of points to be relied upon by appellant in the Supreme Court of the United States of America is hereby acknowledged and accepted on behalf of the several defendants and appellees.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by S. H. Brown, Assistant Attorney General.

[fol. 212] SUPREME COURT OF THE UNITED STATES

DESIGNATION

Comes now the Appellant in the above-entitled case and states that in its opinion the whole record as filed is necessary for consideration of the case excepting the following, which may be omitted:

1. Opinion of District Court filed December 9, 1931. (Printed Record, page 79.)
2. Order approving bonds. (Printed Record, page 89.)
3. Stipulation re substitution of J. Dan Talbott. (Printed Record, page 90.)
4. Petition for appeal—on first appeal. (Printed Record, page 91.)
5. Assignment of errors—on first appeal. (Printed Record, page 92.)
6. Order allowing appeal—on first appeal. (Printed Record, page 100.)
7. Stipulation re Transcript of Record—on first appeal. (Printed Record, page 101.)

[fol. 213] 8. Statement of points to be relied on—on first appeal. (Printed Record, page 103.)

9. Statement of portion of record to be printed—on first appeal. (Printed Record, page 106.)

J. C. Penney Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and ac-

knowledged on behalf of the several defendants and appellees mentioned hereinabove.

John B. Lewis, W. P. Sullivan and Emerson Beauchamp, individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky; Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

[fol. 214] [File endorsement omitted.]

[fol. 215] SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLEES OF PORTION OF RECORD TO BE PRINTED BY CLERK—Filed Oct. 9, 1934

Come now the appellees, in the above entitled case, and state that, in their opinion, in addition to those parts of the record designated by the appellant, there should be printed for consideration of the Court:

1. Opinion of the District Court filed December 9, 1931. (Printed Record, page 77.)

[fol. 216] John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky; Bailey P. Wootton, Attorney General, by S. H. Brown, Assistant Attorney General.

Service of a copy of the above statement of portion of record to be printed by Clerk is hereby accepted and acknowledged on behalf of the appellant and appellees mentioned hereinabove.

J. C. Penney Company, Appellant, by Robert S. Marx, Frank E. Wood, John C. Doolan, Harry Kasfir, James W. Stites, Solicitors.

[fol. 217] [File endorsement omitted.]

Endorsed on cover: File No. 39.084. W. Kentucky, D. C. U. S. Term No. 456. J. C. Penney Company, Appellant, vs. John B. Lewis, W. P. Sullivan and Emerson Beauchamp, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, et al. Filed October 9, 1934. File No. 456, O. T., 1934.

(5749-C)